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Constitutional Welfare Rights: A History, Critique and Reconstruction

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THE CONSTITUTION AND THE OBLIGATIONS OF GOVERNMENT TO SECURE THE MATERIAL PRECONDITIONS FOR A GOOD SOCIETY

CONSTITUTIONAL WELFARE RIGHTS: A HISTORY, CRITIQUE AND RECONSTRUCTION

*William E. Forbath**

TABLE OF CONTENTS

INTRODUCTION.....	1822
I. THE IDEA OF WELFARE RIGHTS "DOESN'T LIVE IN THIS WORLD ANYMORE"	1824
II. THE SOCIAL CITIZENSHIP TRADITION	1827
A. <i>Two Egalitarian Traditions</i>	1827
B. <i>Populists and Progressives: The Original Republican- Pragmatist Synthesis</i>	1828
C. <i>The New Deal Constitution of Social Citizenship: "At the Very Hub. . . is the Right to Have a Job"</i>	1831
D. <i>The Solid South and the Fracturing of Social Citizenship</i> ..	1835
III. THE WAR ON POVERTY AND THE WELFARE RIGHTS MOVEMENT	1838
A. <i>AFDC and the "Welfare Explosion"</i>	1838
B. <i>A "Negroes' New Deal Thirty Years Late": The Civil Rights Solution to Black Poverty</i>	1842
C. <i>The War on Poverty Fosters a Social Movement</i>	1845
D. <i>The NWRO and the Right to a "Guaranteed Adequate Income": Gender, Race, and Citizenship in the Consumers' Republic</i>	1850
IV. WELFARE RIGHTS IN THE COURTS	1855
A. <i>The Federal Legal Services Program and the Welfare Rights Attorneys</i>	1855
B. <i>The "Fair Hearings" Campaign</i>	1856

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C. *The Welfare Rights Legal Strategy* 1858

D. *The "New Property": Cultural Resonance, Normative Ambiguity* 1863

V. MICHELMAN'S CONSTITUTIONAL WAR ON POVERTY 1867

A. *"Minimum Protection," "Just Wants," and "Basic Needs"* 1867

B. *A Critical Reading of Michelman on Rawls* 1873

C. *Justiciability as a Concern for Judicial Competence and Legitimacy* 1877

D. *Justiciability as Mechanical Applicability* 1879

VI. A REPUBLICAN CASE FOR WELFARE RIGHTS 1882

A. *The Distributive Dimension of Constitutional Property Rights and the Problem of Legal Form* 1882

B. *Republicanism versus Welfare Rights* 1885

CONCLUSION: BEYOND WELFARE RIGHTS 1887

INTRODUCTION

"The owl of Minerva flies at dusk." Critical understanding is partly historical understanding; it takes time. Dusk seems to have come for constitutional welfare rights, an intellectual and practical project of many revered lawyers, judges, and scholars during the 1960s and 1970s. This essay is an initial effort to understand that project historically, to arrive at some critical judgments, and to see whether this history and these judgments suggest possibilities for reconstruction.

Like every great effort to expand citizens' rights, this one was tied to a social movement. The welfare rights movement was extraordinary in the annals of American reform. Never before had poor African-American women formed the rank and file of a nationally organized movement. The movement assailed and disrupted public welfare offices and programs; yet the federal government paid its organizers and legal advocates. Its rights talk and conception of equal citizenship broke sharply with those of past movements for social and economic justice. It was something new and bold; at the same time, it was profoundly shaped by the outcome of past moments of constitutional politics and social reform.

Constitutional scholars see the origins of the constitutional welfare rights idea in the Warren Court's Fourteenth Amendment case law and the Court's new solicitude toward the nation's poor. This is true, but only because of the historical context that led 1960s policymakers, legal advocates and constitutional scholars to make welfare the terrain on which they waged their "War on Poverty." That context lay

in the constraints and opportunities created by inherited statutory, institutional, and ideological frameworks—results of the victories and defeats of earlier efforts to institute a more substantive and “social” conception of citizenship rights.

Thus, we will see, it was the defeat of key New Deal reforms that deprived 1960s advocates of broader channels down which to try to nudge the Court’s solicitude. FDR’s vaunted right to decent work met defeat at the hands of Jim Crow and the Solid South. Keeping blacks dependent on local labor markets and poor relief was the principal reason for the segmented and caste-ridden system of social provision and labor rights bequeathed by the New Deal. A quarter century later, this system underpinned a fairly robust private welfare state of job security, pensions and health insurance for organized workers in core sectors of the industrial economy. But that meld of public and private rights excluded most African-Americans, whose anger exploded in all the large cities of the North, where millions of Southern blacks had moved over the preceding decades to escape Jim Crow and rural unemployment. For them, public assistance, primarily Aid to Families with Dependent Children (“AFDC”), stood as the sole federal protection against poverty. It was this separate, decentralized, and deeply gendered benefits program, stamped with many of the centuries-old degradations of poor relief, that welfare rights organizers and advocates sought to transform into a dignifying right to a guaranteed income.

Only from this longer perspective can one fully understand the accomplishments and limitations of the welfare rights movement—and of the jurisprudence it inspired. Excluded from a work-based world of social citizenship, the movement and the jurisprudence sought to fashion such a normative world untethered to work. This circumstance went a long way, I will suggest, in determining their critical strengths and weaknesses; but the constitutional scholars left it unexamined.

The Court and the executive branch soon set their faces against welfare rights. The social movement died. Reigning policy mavens abandoned guaranteed income as the appropriate national response to poverty in favor of older ideas about improving the moral character of the poor. Meanwhile, as the Court grew more conservative, liberal constitutional scholars grew more theoretical. They read democratic and civic republican political theory and built up more general, less court-centered accounts of constitutional democracy as a system of self-government. Still, welfare rights remained the principal way they conceived the social substance and material foundation of equal citizenship.

This steadfastness was admirable. Yet, on rereading the welfare rights jurisprudence, one finds a striking gap between the rights the constitutional scholars are championing and the reasons, thinkers, and

traditions they rely on. The scholars' own arguments as well as the past and present normative resources on which they draw—republican tradition, Rawlsian liberalism—point toward a different, broader conception of the material bases of equal citizenship. It is a work-based conception, the very one which animated the New Deal and earlier movements for social citizenship. The welfare rights ideal provides an enduring critique of this older tradition; it should prompt us to undo the coercive, caste-ridden, and gendered aspects of that tradition, but, I will argue, it cannot supplant it.

I. THE IDEA OF WELFARE RIGHTS “DOESN’T LIVE IN THIS WORLD ANYMORE”

How should one read the signs of the times? In 1996, Congress repealed the nation's sole federal welfare guarantee.¹ In the law reviews and the halls of Congress, no protests arose from the ranks of liberal constitutional law scholars. The conscientious legislator² could infer from this unbroken silence that Congress' action imperiled no constitutional commitments. Lawmakers know that liberal and conservative constitutional scholars alike fashion an aspirational Constitution, an “ideal Constitution of best interpretations,” in Jack Balkin's words, “that academics hope will someday become the positive law.”³ And liberal and conservative lawmakers will sometimes take their bearings from these “best interpretations.”⁴ However, Balkin also observes that while constitutional welfare rights were “very much on the agenda of the liberal academy”⁵ in the 1960s, they are not so today. Today, welfare rights are no longer part of anyone's “ideal Constitution.”⁶ Today, the idea simply seems “off the table” and “off-the-wall.”⁷

Lawrence Lessig made much the same point at the first Fordham Symposium on constitutional theory in 1996.⁸ In the colloquy after his paper, Lessig set about illustrating the idea of “interpretive context” and the way such contexts are formed by uncontested “background assumptions.”⁹ One such taken-for-granted assumption today, Lessig

1. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-293, 1996 U.S.C.A.N. (110 Stat.) 2015 (repealing Aid to Families with Dependent Children).

2. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975).

3. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1734 (1997).

4. *Id.*

5. *Id.* at 1732-33.

6. *Id.*

7. *Id.*

8. Lawrence Lessig, Colloquy, *Fidelity as Translation*, 65 Fordham L. Rev. 1507, 1509-10 (1997).

9. *Id.* at 1509.

explained, is that "our constitutional tradition" is indifferent to "economic inequality."¹⁰ "Here is Frank Michelman," he went on, pointing to a figure in the front row. "In 1969, he writes a piece [*On Protecting the Poor Through the Fourteenth Amendment*]¹¹ that simply doesn't live in this world anymore. Why? Did he just not understand our constitutional tradition then?"¹² No, Lessig explained, if "none of us would write [such a piece today]," that was "a reflection of . . . how our background [context] has changed."¹³

Balkin and Lessig ignore that many liberal constitutional scholars have not quite ceased contending that the Constitution condemns poverty—not the current Supreme Court's Constitution, to be sure, but certainly "our Constitutional tradition" and surely the "ideal Constitution of best interpretations."¹⁴ Such theorists as Cass Sunstein, Lawrence Sager, and Akhil Amar seem still to hew to this view.¹⁵ Nor does Frank Michelman appear to have abandoned it. Balkin recently published an important essay that plainly assumes that attacking poverty through the Fourteenth Amendment is neither off the table, nor off-the-wall, but instead is well within the terms of contemporary liberal constitutional discourse.¹⁶

So, like Banquo's ghost, the idea of constitutional welfare rights will not die down, but it is not exactly alive, either. No fresh or even sustained arguments on its behalf have appeared for over a decade; only nods, and glancing acknowledgments. Some liberals, like Ronald Dworkin, now use the idea to affirm their steely distance from heedless activism and free-form interpretive methods; poverty has become the paradigmatic social wrong they would not dream of viewing as a constitutional wrong.¹⁷

Lessig seems to think that the idea of constitutional welfare rights "doesn't live in this world anymore" because of unspecified but deep changes in our political norms and our knowledge about the world.¹⁸ This sounds overblown, but certainly, the Court, Congress, and the nation have turned rightward; welfare has taken a thrashing, and older ideas about poverty and improving the poor have reasserted themselves. All this is relevant to explaining the scholars'

10. *Id.*

11. Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) [hereinafter Michelman, *Protecting the Poor*].

12. Lessig, *supra* note 8, at 1509-10.

13. *Id.* at 1510.

14. *Id.* at 1509.

15. See Cass R. Sunstein, *The Partial Constitution* 138-41 (1993); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv. J.L. & Pub. Pol'y 37 (1990); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 419 (1993).

16. See J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313 (1997).

17. See Ronald Dworkin, *Freedom's Law* 36 (1996).

18. Lessig, *supra* note 8, at 1509.

ambivalence. It is Balkin's explanation. Sandy Levinson puts the point more sharply,¹⁹ suggesting that liberal scholars began to spurn constitutional welfare rights after—and partly because—Georgetown's Peter Edelman appeared to have lost a federal judgeship when Senate Republicans read his 1987 article, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*.²⁰

I don't find the political explanations adequate. If liberal constitutional scholars have grown ambivalent about welfare rights, and scholarship about the material bases of equal citizenship is at an impasse, the reasons may also run deeper. They may lie in a lack of fit between welfare rights and the normative and historical premises the scholarship relies on. The "best interpretations" may have eluded us, because, as I have suggested, both our historical traditions and our philosophical guides point toward a different and broader conception of the material and distributive dimensions of constitutional equality than is dreamt of in the jurisprudence of welfare rights.

No one has thought and written more deeply and imaginatively about constitutional welfare rights than Frank Michelman, and no one has approached the problem from as many fruitful perspectives. So, if my argument rings true regarding Michelman's work, there may be something to it. I will proceed, first, by briefly sketching the history of this broader conception of constitutional equality, which I have called the social citizenship tradition. From there, I will turn to the history of the welfare rights movement and its differences with and departures from that tradition. I'll situate Michelman's writings on welfare rights in the context of the social movement and its legal and political outlook and initiatives. This contextual account will set the stage for a textual argument, a critical reading of Michelman's reading of Rawls. Michelman's search for welfare rights in Rawls' *Theory of Justice*, I will suggest, led him to overlook the extent to which Rawls is critical of welfare state liberalism in favor of a more ambitious "constitutional political economy," one that Rawls has dubbed a "property-owning democracy." Michelman reads Rawls' difference principle with an eye to income distribution and finds it flawed. He makes a good case; however, I will argue, Rawls is better read as a cogent liberal defender of social citizenship than as a flawed welfare rights champion.

Michelman turned from Rawls to republicanism and developed an enormously influential reading of the republican tradition in American constitutional discourse; a key aspect of Michelman's republican revival is its distinctive treatment of the distributive dimension of constitutional property claims. Here, Michelman reads

19. *Id.* at 1510-11, 1517.

20. See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *Hastings L.J.* 1 (1987); Lessig, *supra* note 8, at 1510-11, 1517.

republicanism as he reads Rawls; both imply constitutional welfare rights. But the republican tradition, I will argue, is hostile toward welfare rights; its distributive norms point to work and the distribution of material opportunities for self support and "independence." Welfare rights are better seen as a critique of this distributive dimension of republicanism than as an implication of it.

Finally, running through Michelman's writings on welfare rights has been a thoughtful engagement with problems of justiciability and the formal dimensions of constitutional law as law. Beyond the question of judicial competence lies the question of whether welfare rights ought not to be preferred over broader, work-based conceptions of social citizenship rights because the latter—if ever America adopted them—would stymie and interfere with democratic politics at every turn. I also address these cogent questions.

II. THE SOCIAL CITIZENSHIP TRADITION

A. Two Egalitarian Traditions

America has known two egalitarian constitutional traditions, both with roots in Antislavery and Reconstruction. A familiar one, springing from *Brown v. Board of Education*,²¹ takes aim at caste and racial subordination. Court-centered and countermajoritarian, it guards against racial and caste-based subordination. A second, almost forgotten one, assailed harsh class inequalities. Centered on decent work, livelihoods, and social provision, it read the promise of the Antislavery and Reconstruction Amendments in "Free Labor" terms, as a guarantee of opportunities for self-improvement and a measure of material independence and security for all. We have forgotten it, partly because it shunned the courts and addressed its constitutional arguments to lawmakers and citizens, but it linked Reconstruction Era reformers to succeeding generations of Populists, Progressives, and New Dealers. Borrowing a phrase from its Progressive Era proponents, I have dubbed it the social citizenship tradition.²²

As we'll see, the idea of constitutional welfare rights emerged from the first tradition, as a visionary extension of Warren Court equal protection law. Yet, the idea's defenders made the case for welfare rights in terms that sounded more fully in the social citizenship tradition's account of the distributive and enabling dimensions of constitutional equality. From that perspective, however, the idea is not a visionary extension but a torn remnant.

21. 347 U.S. 483 (1954).

22. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999). The account of the social citizenship tradition that follows draws on this article.

Over time and across social groups social citizenship's exponents differed widely about what reforms their vision demanded and who belonged to the community of full citizens. Still, all agreed that the nation's political economy was rife with constitutional infirmities and that the Constitution, rightly understood or amended, demanded that the nation mend them.

Looking back at these generations of reform-minded constitutional thinkers from the Gilded Age to the New Deal, we remember the restraints they demanded of the judiciary, but forget the affirmative obligations their constitutional outlook laid on the other branches of government.

B. Populists and Progressives: The Original Republican-Pragmatist Synthesis

Consider the Populists. Their account of constitutional crisis in the 1880s and 1890s was two-fold. "Equal rights" and the very standing of farmers and working people as citizens were in jeopardy because of corporate power and exploitation, and so too was popular sovereignty. Corporate power had reduced workers to wage slaves and farmers to indentured tenants and sharecroppers, and combined with an overweening judiciary and a corrupt party system, corporations had shattered the sovereign people's control of government. Populists produced entire journals devoted to constitutional political economy—thousands of densely argued pages melding political-economic and constitutional analyses of the nation's banking and currency, corporations, and industrial relations law—framed by the general claim, in the words of one leading editor, that the Constitution's "doctrine of equality" was "not limited to a dogma that all men should be made equal before the law." The "real theory" of constitutional equality was broader. "In our Constitution the principle is imbedded of securing 'the widest distribution among the people, not only of political power, but of the advantages of wealth . . . and social influence.'"²³ "Only thus could the Nation 'maintain the practical equality of all the people.'"²⁴ This thicker social conception of "equal rights," he insisted, was "the great basic idea of our laws, the very corner-stone of the republican structure."²⁵ So, it was "'vitaly necess[ary to] discover . . . exactly where and how the constitutional principle was violated, and restore the supremacy of republican

23. Jas. F. Hudson, *Railways: Their Uses and Abuses, and Their Effect Upon Republican Institutions and Productive Industries*, Nat'l Economist, May 11, 1889, at 113, quoted in Forbath, *supra* note 22, at 43.

24. Jas. F. Hudson, *Railways: Their Uses and Abuses, and Their Effect Upon Republican Institutions and Productive Industries*, No. 2, Nat'l Economist, May 18, 1889, at 137, quoted in Forbath, *supra* note 22, at 43.

25. *Id.*

doctrine.”²⁶ The Populists, then, defended a positive constitutional order; they envisioned a “Reconstructed” political economy as the vehicle for securing the constitutional norms of decent livelihoods, independence, responsibility and dignifying work.²⁷

This tradition changed in the hands of the Progressives, becoming more state-centered and championing state-administered labor protections and state-based social provision to assure material dignity and opportunities for decent work. Middle-class Progressives leaned heavily on the authority and managerial “expertise” of the new professions. Still, they emphasized the old verities linking work, material independence, and republican citizenship.

I have written elsewhere about the constitutional thinking of Progressive reformers.²⁸ Let’s focus briefly on one of them. Herbert Croly was as “modern” a Progressive as any, a critic of nineteenth century dogmas of all kinds, yet even he was engaged with the political economy of republican citizenship that animated nineteenth century reform. A glimpse at Croly’s theory of “Progressive Democracy” will help us later to compare the Progressives’ melding of republican and pragmatist thought with Michelman’s, and to consider Michelman’s own interpretation of his Progressive forebears.

“How,” Croly repeatedly asked, “can the wage-earners obtain an amount of economic independence analogous to that upon which the pioneer democrat could count?” Social insurance and social legislation were necessary, but no substitute for transforming “the wage system itself in the interest of an industrial self-governing democracy . . . a new system, based upon the dignity, the responsibility and the moral value of human work.” This was essential, in Croly’s account, to “converting civil and political liberty” under the “old Constitution,” into their “social consumation.”²⁹

26. *Id.*

27. See Forbath, *supra* note 22, at 43–49.

28. See William E. Forbath, *Law and the Shaping of the American Labor Movement* (1991) [hereinafter Forbath, *American Labor Movement*]; William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America*, 16 *Law & Soc. Inquiry* 1 (1991); Forbath, *supra* note 22.

29. Herbert Croly, *Progressive Democracy* 215, 380, 384 (1914). On Progressive efforts at creating state-based social insurance, see generally Arthur Link and Richard McCormick, *Progressivism* (1983); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1992) [hereinafter Skocpol, *Protecting Soldiers and Mothers*]; David Thelen, Robert M. LaFollette and the Insurgent Spirit (1976); David Thelen, *The New Citizenship: Origins of Progressivism in Wisconsin, 1885–1900* (1972). See generally, Udo Sautter, *Three Cheers for the Unemployed: Government and Unemployment Before the New Deal* (1991).

On the Progressives as state-builders and would-be state-builders, see William Forbath, *Law and the Shaping of Labor Politics in the United States and England, in Labor Law in America: Historical and Critical Essays* 201 (Christopher L. Tomlins & Andrew J. King, eds. 1992); Forbath, *American Labor Movement, supra* note 28; Kathryn Kish Sklar, *Two Political Cultures in the Progressive Era, in United States History as Women’s History* (Linda Kerber, Alice Kessler-Harris, and Kathryn Kish

Like John Dewey, Croly's critique of the "old Constitution" extended to constitutionalism in general. Constitutionalism was just what the laissez-faire jurists insisted: a limit on the democracy's capacity to reconstruct its social environment by redistributive means. Yet even such a thorough-going anti-constitutionalist as Croly framed the case for reform within a constitutional narrative and interpretation of the founding. He developed his theory of "Progressive Democracy" around the contrast and continuities between a legalist, court-dominated mode of constitutional self-definition and self-restraint and a more political democratic and participatory one.

"The American democracy," Croly argued, could accept "in the beginning an inaccessible body of [judge-made] Law," and the judiciary's "uncontrollable" sway over the political economy, because "the Law promised property to all."³⁰ This was the Constitution's "original promise": economic opportunity and a republic of freeholders secured by limited government and equal rights to own and hold property. And this promise made the Constitution a "working compromise" between the "pioneer democrat" and "the monarchy of the Law and aristocracy of the robe."³¹ In industrial America, however, Croly contended, in terms that echoed countless other Progressive thinkers and reformers, the ideals of liberty and equality that were "wrought into our constitutions" no longer "consist[ed] in the specific formulation of legal and economic individualism" defended by the courts. Interpreting and safeguarding these constitutional ideals now properly belonged to the active law-making and law-administering branches watched over by an active citizenry.³² This was warranted on grounds of popular sovereignty; it also had a compelling functional justification. Because securing the "socially desirable consumation" of the old liberties demanded data gathering, complex and necessarily fallible choices, and expert policymaking, the courts' authority to interpret and apply the norms of liberty and equality had to give way. Ending the "benevolent monarchy" of the courts was not chiefly a matter of institutional competence, however. For Croly, the main argument for a more democratic form of self-government and self-restraint was "educational."³³ Americans were "suffering from the division of purpose between their democracy and their Law," allowing the latter to substitute for any profound popular regard for vision, principle and collective self-restraint.³⁴ For "popular political education" to progress, the citizenry must assume more of the "duty

Sklar eds. 1995); Skocpol, *Protecting Soldiers and Mothers* *supra*; Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982).

30. Croly, *supra* note 29, at 125.

31. *Id.* at 46, 58, 125, 215.

32. *Id.* at 208-09.

33. *Id.* at 144.

34. *Id.* at 146-47, 158.

of thinking over their political system," their basic principles, and their "fundamental political problems."³⁵

Thus, in good Deweyan fashion, Croly argued for a more experimental and participatory form of constitutional deliberation and decision. "Progressive democracy must reject the finality of [the] specific formulations" of "states rights" and "individual rights" offered up by the courts.³⁶ The problem was not the practice of applying the "righteous ideals" of constitutional liberty and equality to challenged laws and institutional arrangements; that "would always be binding and liberating." The problem was "the sacredness attached to a particular method of applying the ideals."³⁷ Instead, Croly evoked a more responsible and active exercise of character-forming collective deliberation and choice, mindful of the principles that underpinned the courts' "specific formulations," and subject, therefore, to "severe limitations" on majority will, but only by dint of its own self-reflective deliberations and self-imposed constraints.³⁸

Whether the pragmatist "progressive" had the better of the legalist "conservative" was not solely a matter of reasoned argument, for the "progressive" case rested also on a "democratic faith."³⁹ The faith, no doubt, was easier come by because the imagined field of action was chiefly that of economic relations—not civil liberties, about which Croly, like most leading Progressives, was largely indifferent, nor race relations, about which most white Progressives nursed a callous and bigoted notion of evolutionary "progress." Perhaps, as pragmatists, some of them would not be surprised to learn that theirs has proved a partial and one-sided view of the democratic resources of "higher law" and judicial authority.

C. The New Deal Constitution of Social Citizenship: "At the Very Hub . . . is the Right to Have a Job"

In any case, Gilded Age reformers and early twentieth century Progressives bequeathed to FDR and the New Dealers not only a rich language of social citizenship but a narrative of constitutional change and continuity, modes of constitutional interpretation and conceptions of the allocation of interpretive authority that supported the New Dealers' constitutional revolution. Demands for social and economic

35. *Id.* at 150.

36. *Id.* at 240.

37. *Id.* at 209.

38. *Id.* at 151. How best to institutionalize this more democratic form of constitutional review was a matter Croly left to others; his only concrete proposal for constitutional change was amending the amendment process. Some Progressives advocated an end to judicial review, others called for empowering Congress to re-enact with super-majorities laws invalidated by the courts. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994).

39. Croly, *supra* note 29, at 199.

rights framed the language of New Deal reform. Whether one listened to union stump speeches or the President's radio addresses, read the bills before Congress and the debates around them, or even attended the sessions of the American Law Institute, robust social and economic rights talk (and ideas for institutionalizing such rights) were everywhere. As we have seen, the idea that government was obliged to secure conditions that enabled every person to make a decent living harked back to the Gilded Age, but only during the New Deal did this idea become the mandate of a national administration and a party in power.

Already during his first year in office, FDR promised a redefinition of the duties of government and a "redefinition of [classical liberal] rights in terms of a changing and growing social order."⁴⁰ In the past, FDR explained, quoting Jefferson (and with Jefferson neglecting the black laboring class), America had "no paupers. The great mass of our population [was] of laborers . . . [and] [m]ost of the laboring class possess[ed] property."⁴¹ For this yeoman citizenry, Roosevelt observed, the rights "involved in acquiring and possessing property" combined with the ballot and the freedom to live by one's "own lights" to ensure liberty and equality.⁴² "The happiest of economic conditions made that day [of Jeffersonian individualism] long and splendid. [For on] the Western frontier, land was substantially free." The "turn of the tide came with the turn of the century . . . [T]here was no more free land and our industrial combinations had become great uncontrolled and irresponsible units of power within the State."⁴³

These "conditions impose[d] new requirements upon Government" and new meanings on old texts. A mature industrial society could not be governed by a laissez-faire Constitution, insulating industry and finance from the modern claims of liberty and equality. America needed an "economic constitutional order."⁴⁴ The "terms" of our basic rights "are as old as the Republic"; but new conditions demand new readings. "Every man has a right to live," Roosevelt declared, and "this means . . . a right to make a comfortable living." The "Government formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of [the nation's] plenty sufficient for his needs, through his own work."⁴⁵

40. Franklin D. Roosevelt, *New Conditions Impose New Requirements Upon Government and Those Who Conduct Government*, Campaign Address at the Commonwealth Club, San Francisco, Calif. (Sept. 23, 1932), in 1 *The Public Papers of Franklin D. Roosevelt* 752, 753 (1938) [hereinafter Roosevelt, Public Papers].

41. *Id.* at 745.

42. *Id.* at 746.

43. *Id.* at 746, 749.

44. *Id.* at 752.

45. *Id.* at 754.

FDR introduced the “general welfare Constitution” in his 1934 address to Congress announcing the formation of the Committee on Economic Security, which would draft the administration’s version of the Social Security Act of 1935. There he also continued to assimilate the new social rights to the “old and sacred possessive [traditional, constitutionally enshrined common law] rights” of property and labor. In pre-industrial America, these common law rights had had rich significance for the “welfare and happiness” of ordinary Americans; now, only the recognition of new governmental responsibilities would enable “a recovery” of the old rights’ once robust social meaning.⁴⁶

Repeatedly, FDR and New Dealers in Congress spoke in terms of the non-judicial branches’ obligation to redeem the “new social rights” that were the “modern substance” of the old guarantees of constitutional liberty and equality. Always “paramount” was work, or what the Committee on Economic Security called “employment assurance” for “those able-bodied workers whom industry cannot employ at a given time.”⁴⁷ As the Social Security Act’s sponsor in the Senate, Robert Wagner underscored that “[a]t the very hub of social security is the right to have a job.” Unemployment insurance was designed “not to supplant, but rather to supplement” the government’s obligation to assure work for the “bulk of persons . . . disinherited for long periods of time by private industry.” The Social Security Act would not work without federal guarantees for those who could not find private employment.⁴⁸ Roosevelt concurred. A national guarantee assuring the “opportunity to make a living—a living decent according to the standard of the time” was at the heart of the new understanding of liberty he’d proclaimed.⁴⁹ Income security for those who could not work and public employment for those who could not find decent jobs in the private economy had to become the “permanent policy [of] the federal government.”⁵⁰

By 1945, when Congress took up the administration’s Full Employment Bill, the “all-important right to work” seemed secure, not only in labor movement and reform rhetoric but in the discourse of the

46. Franklin D. Roosevelt, *Objectives of the Administration*, (June 8, 1934), in Roosevelt, 3 Public Papers, *supra* note 40, at 291-92.

47. H.R. Doc. No. 81, 79 Cong. Rec. 1, 546 (1935).

48. 79 Cong. Rec. 9283, 9284 (1935) (remarks of Sen. Wagner).

49. See, e.g., Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency, Philadelphia, Pennsylvania (June 27, 1936) in Roosevelt, 5 Public Papers, *supra* note 40, at 233-34 (struggling against economic “tyranny” has given “us as a people a new understanding of our Government and of ourselves” . . . inherited understandings had brought us to the brink of “economic slavery.” . . . Now we know “freedom is no half and half affair.” Government has “inescapable obligations” to “protect the citizen in his right to work and his right to live” no less than “in his right to vote.”).

50. Preliminary Report of the Staff of the Committee on Economic Security 415 (Sept. 1934), *reprinted in* Statutory History of the United States: Income Security 72, 73 (Robert B. Stevens ed., 1970).

liberal legal establishment. That year the American Law Institute appointed a committee of legal luminaries to draft a "Statement of Essential Human Rights." The staff of the Senate committee, holding hearings on FDR's "Full Employment Bill," asked the members of the ALI group to prepare "an analysis of the legal and philosophical considerations that led to the inclusion of the right to work" in the ALI Statement.⁵¹

Liberal legal notables like these had inscribed FDR's "four freedoms" and "second bill of rights" into the founding documents and machinery—the Atlantic Charter, the UN Charter, Bretton Woods—of the post-war international order. As they surveyed those new institutions, as well as the "the forty nations whose current or recent constitutions contain provisions granting various social and economic rights," and put these alongside the "fundamental legislative measures passed in the United States in the last dozen years to secure such rights to its citizens," they concluded that "the place of social and economic rights in any modern declaration of the rights of man has already been decided."⁵² In particular, no "modern understanding or bill of rights" could omit the right to work, whose popular support seemed "irresistible." Yet, this idea of a right, "which requires positive action by government, involving complex organization and the expenditures of public funds" seemed to many "inconsistent with the American tradition," "paternalis[ti]c," potentially "tyrann[ical]," and, at the same time, "useless because it is impossible to go into court and force the government . . . to insure that a man has a job."⁵³

The ALI draftsmen set out to respond, justifying the idea "in the light of these traditional habits of thought." To those who insisted on "the traditional legal habit of looking upon rights as negative," they replied with arguments we will want to recall when we turn to Michelman's discussion of this tension between social rights and legal habits of mind. The draftsmen suggested that conceptions inherited from the "seventeenth and eighteenth centuries" imparted "confusion" and "rigidity to legal thinking about rights" that ill-served "the legislators who must implement" the Constitution. Thus, they pointed out that several of the rights in the Bill of Rights "actually require government to take very positive action indeed . . . [entailing] all the involved and expensive machinery for the administration of civil and criminal justice. . . . In terms of mechanism and trained personnel, a system of

51. John Ellington, William Draper Lewis, C. Wilfred Jenks, chair and members drafting committee, Full Employment Act of 1945: *Hearings Before a Subcommittee on Banking and Currency on S. 380*, 79th Cong., 1st Sess. 1248-59 (1945) (Statement of Essential Human Rights, The Right to Work).

52. *Id.* at 1248-49.

53. *Id.* at 1254.

social insurance is child's play in comparison with the system that gives effect to due process of law."⁵⁴

To the reproach that the right to work did not lend itself to judicial enforcement, another question we will take up with Michelman, they responded first that "legal invention [could] develop new procedures" and second that, in any case, "immediate judicial enforceability" was not the right test of a right. The framers afforded good authority that the Constitution "was equally binding" on the Congress, and that the latter "had the right to determine for itself the meaning of its provisions." "A Bill of Rights is more than a consolidation of the fractions of freedom already gained. . . . It is a directive to the whole society and a guide to legislatures and executives in the framing of laws and regulations that will gradually make the rights effective." The reason to recognize social and economic rights in a Bill of Rights is chiefly to erect a standard "around which public opinion can mobilize . . . and the acts of legislatures and executives be guided and judged."⁵⁵

D. The Solid South and the Fracturing of Social Citizenship

What, then, became of the New Deal's robust conception of social citizenship and of its vaunted right to decent work? Between the popular ratification of the New Deal vision of citizenship and its enactment into law fell the shadow of Jim Crow and the nation's betrayal of Reconstruction. Measures instituting rights to decent work and social provision for all Americans enjoyed broad support; yet they expired in Congress. The explanation lies chiefly in what V.O. Key long ago called the "Southern Veto": the hammer lock on Congress that Southern Democrats enjoyed by dint of their numbers, their seniority and their control over key committees.⁵⁶ Hailing from an impoverished region with a populist tradition, most Southern Democrats were staunch supporters of the New Deal until the late 1930s. In exchange for their support, however, they insisted on decentralized state administration and local standard setting of all labor measures and demanded that key bills exclude the main categories of Southern labor. Otherwise, how "were they going to get blacks to pick and chop cotton, when Negroes [on federal work programs] were getting twice as much as they had ever been paid" and when old-age insurance and social security bills had provisions that "would demoralize our region," until the Southern committee heads rewrote them.⁵⁷

54. *Id.* at 1257.

55. *Id.* at 1258.

56. Key describes how the Dixiecrats exercised this power to veto civil rights legislation. See V.O. Key, Jr., *Southern Politics in State and Nation* 345-82 (1949). But the Dixiecrats used their veto power more broadly.

57. Senator Carter Glass of Virginia, *quoted in* Harvard Sitkoff, 1 *A New Deal for Blacks: The Depression Decade* 104 (1978). See also, Gavin Wright, *Old South, New South: Revolutions in the Southern Economy Since the Civil War* 219 (1986) (quoting

By allying with Northern Republicans, or by threatening to do so, they stripped all the main pieces of New Deal legislation of any design or provision that threatened the separate Southern labor market and its distinctive melding of class and caste relations, its racial segmentation and its low wages. Consider, for example, the Social Security Act. The Committee on Economic Security had crafted the administration's proposals to propitiate the Southerners. For that reason the proposals favored state-level autonomy—albeit with national minimum standards—in both the unemployment insurance and assistance for the needy, aged, dependent children, and blind programs. Only the old-age benefits program would be purely federal.⁵⁸ But the Dixiecrats exacted more concessions from the congressional sponsors of the administration bill. National standards for unemployment and old-age insurance were dropped and the administration's commitment to include all employed persons in the unemployment and old-age insurance schemes was sacrificed. The price of Dixiecrat support included drumming out of the insurance programs agricultural and domestic workers—and thereby the majority of black Americans, who worked in these two occupations.⁵⁹

The AAA, the NRA, the National Labor Relations and Fair Labor Standards Acts, all were tailored in this fashion. More encompassing and inclusive bills, bills with national, rather than local, standards and administration, enjoyed solid support from the Northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites); but the Southern Junkers and their "racial civilization" exacted a price, and FDR, willingly at first, paid up.⁶⁰ This "gentleman's agreement" that held the party together... appeared unshakable. The White House and the Dixie courthouse seemed solidly allied.⁶¹ However, as the new industrial unions of the CIO and the black voters of the North loomed large in FDR's 1936 reelection bid and

Congressman "Cotton Ed" Smith: "Any man on this floor who has sense enough to read the English language knows that the main objective of this bill [original Fair Labor Standards Bill] is, by human legislation, to overcome the splendid gifts of God to the South.")

58. See Arthur J. Altmeyer, *The Formative Years of Social Security* 14-15 (1966); Frances Perkins, *The Roosevelt I Knew* 287-92 (1946); Edwin E. Witte, *The Development of the Social Security Act* 3-110 (1962) (describing the history of the Social Security Act).

59. See generally Altmeyer, *supra* note 58, at 35; Witte, *supra* note 58; Perkins, *supra* note 58, at 296-301; Kenneth Finegold, *Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps, in The Politics of Social Policy in the United States* 199-234 (Margaret Weir et al. eds., 1988).

60. See generally, Sitkoff, *supra* note 57; James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (1967); Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (1983) [*hereinafter* Weiss, *Farewell to the Party of Lincoln*]; Finegold, *supra* note 59; Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 Pol. Sci. Q. 283 (1993) [*hereinafter* Katznelson, et al., *Limiting Liberalism*].

61. Sitkoff, *supra* note 57, at 103.

his social and economic rights talk grew more and more robust and universal, the southern attacks began. Governor Talmadge of Georgia convened a "Grass Roots Convention" to "Uphold the Constitution" against "Negroes, the New Deal and Karl Marx," while Senator Carter Glass of Virginia worried if the white South "will have spirit and courage enough to face the new Reconstruction era that Northern so-called Democrats are menacing us with."⁶²

By the late 1930s, then, roughly half of the southerners in the Senate voted consistently against FDR. Increasingly, roll call votes in both houses revealed Southern Democrats joining with Republicans to oppose administration measures in the areas of labor reform and social insurance. Even more Dixiecrats "backed Roosevelt on a final vote but fought his program in their respective committees, in conference committees, in supporting crippling amendments, and in block[ing] consideration of many [labor, health, and housing] measures."⁶³ Then with the coming of War, the "gentleman's agreement" collapsed. During this uncertain moment of war-time labor shortages, national mobilization and rapid economic and central-state expansion, the Solid South redrew its lines of toleration toward New Deal reform. Southern Congressmen openly joined ranks with the minority-party Republicans to defeat those 1940s legislative programs and structural innovations and institutional reforms in the executive branch that looked toward "completing the New Deal" by enacting and implementing FDR's "second Bill of Rights."⁶⁴ Thus, the Dixiecrats allied with Northern Republicans to scuttle FDR's executive reorganization plan, they gutted the administration's 1945 Full Employment Act, and took the lead in

62. *Id.* at 122-44. See also Weiss, Farewell to the Party of Lincoln, *supra* note 60, at 180-208. Early New Deal programs like the AAA had been tailored by local southern elites and their powerful representatives in Congress to pour aid into southern agriculture without upsetting the plantation system, the very inequities of these programs from tenants' and sharecroppers' perspective sparked protests and national debate. CIO organizers, NAACP leaders, and progressive New Deal administrators lent support to grassroots movements like the biracial Southern Tenant Farmers Union, and wheedled new programs for tenants and sharecroppers from sympathetic New Dealers in Washington. See Sidney Baldwin, *The Rise and Decline of The Farm Security Administration* (1968); David Conrad, *The Forgotten Farmers: The Story of Sharecroppers in The New Deal* (1968); Donald Grubbs, *Cry from the Cotton: The Southern Tenant Farmers' Union* (1971); Edwin Nourse et al., *Three Years of The Agricultural Adjustment Administration* (1937); Lee Alston and Joseph Ferrie, *Resisting the Welfare State: Southern Opposition to the Farm Security Administration*, in *The Emergence of the Modern Political Economy* (Robert Higgs ed., 1985).

63. Sitkoff, *supra* note 57, at 123-24. See also Katznelson, et al. *Limiting Liberalism*, *supra* note 60, at 286-302, which analyzes Southern Democrats voting patterns in eighty-nine Senate and sixty-one House roll call votes on critical New Deal bills and amendments from 1933-50; Jill Quadagno, *The Color of Welfare* 1-23 (1994).

64. See Richard Bensel, *Sectionalism and American Political Development 1880-1980*, at 152-68 (1984); Marion Clawson, *New Deal Planning: The National Resources Planning Board 283-332* (1981); Barry Dean Karl, *Executive Reorganization and Reform In The New Deal: The Genesis of Administrative Management, 1900-1939* (1963); Katznelson, et al., *Limiting Liberalism*, *supra* note 60.

abolishing the National Resources Planning Board.⁶⁵ Together, these would have laid an institutional foundation for active national labor market and full employment policies.⁶⁶ These defeated and dismantled laws, agencies and innovations were ones that would have sustained the public rhetoric and generated the new institutional capacities and commitments embodied in the "all-important right to work," in "the right to earn a decent livelihood," "to opportunity and advancement," "to train and retrain."⁶⁷

III. THE WAR ON POVERTY AND THE WELFARE RIGHTS MOVEMENT

A. AFDC and the "Welfare Explosion"

The New Dealers had looked toward ensuring decent work for all "breadwinners" and social insurance for all families against the poverty that loomed from unemployment, old age, illness or disability. Public assistance would "wither away" as employment assurance and social insurance evolved to the point of protecting virtually all Americans from poverty. The defeat of full employment combined with the exclusion of most of black America (and similarly situated white workers) from the main branches of the New Deal's "general welfare state" to make this no more than a comfortable illusion. Instead of withering away, public assistance or "welfare" became the sole federal protection against poverty for many of the most vulnerable segments of the nation's poor and working-class citizens. And thus "welfare" became the terrain on which liberal legal scholars and activists waged their "War on Poverty."

The Social Security Act of 1934 inaugurated a pension for the elderly—what we now call Social Security, and a program of unemployment compensation or insurance. The old-age pension and the unemployment insurance were contributory. The Act also created

65. See Clawson, *supra* note 64; The New Deal and the South (James C. Cobb & Michael V. Namorato eds., 1984). Stephen Kemp Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946* (1946) [*hereinafter* Bailey, *Congress Makes a Law*] provides the most detailed legislative history of the administration's Full Employment Bill. Bailey chronicles the efforts of Truman and his cabinet to pressure Congress into passing the administration's 1945 Bill. He makes clear that the key players in gutting the Bill were all Southern Democrats. *Id.* at 165-67.

66. See Bailey, *Congress Makes a Law*, *supra* note 65; Clawson, *supra* note 64, at 283-332; Karl, *supra* note 64, at 145-78; Margaret Weir, *Politics and Jobs*, 132-79 (1992); Ira Katznelson and Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, 5 *Stud. in Am. Pol. Dev.* 301 (1991); Katznelson, et al., *Limiting Liberalism*, *supra* note 60.

67. *Full Employment Bill: Hearings Before a Subcommittee on Banking and Currency on S. 380*, 79th Cong., 1st Sess., at 2, 4, 10, 59 (1945). See also Phillip Harvey, *Securing the Right to Employment: Social Welfare Policy and the Unemployed in the United States* (1989).

three public assistance programs. None provided assistance to poor Americans in general. One was for the elderly poor; one for the blind poor; and the third, the salient one in our story, was Aid to Dependent Children (ADC), which in the 1950s would be renamed Aid to Families with Dependent Children or AFDC.⁶⁸

Like the social citizenship tradition generally, the Social Security Act was constructed in a gendered fashion, around the workingman-citizen; social insurance went to full-time (presumptively male) waged workers, and to their economic dependents. Beginning in the early twentieth century, women reformers had built up a "maternalist" complement to this ideal of the workingman-citizen, around the (presumptively native-born, white) widow with children, but no male breadwinner. Working at the level of state government, maternalists fashioned "mothers' pensions" programs in several states, for widowed or deserted women performing the valued citizenly service of child-rearing, as long as they refrained from both waged work and intimate relations with men.⁶⁹ The federal ADC descended from the state-based Mothers' Pensions programs of the early twentieth century, themselves a modern variant of the age-old practice of giving poor relief to "deserving widows."

Thus, all of the federal public assistance programs carried forward the ancient distinction between the deserving and undeserving poor. The latter were able-bodied but idle; the former were excused from working by dint of age or disability or, in the case of widowed or deserted mothers without a male breadwinner, the need to care for young children. In theory, we have noted, the framers of the Social Security Act believed that all the able-bodied would be freed from dependence on poor relief by dint of federal commitments to full employment and decent jobs for all. In practice, poverty persisted among groups cut out of the ambit of federal labor protections and federal contributory social insurance programs.

As with other branches of the statute, Roosevelt's Committee on Economic Security had drafted ADC to propitiate the South. So the states could determine AFDC benefits levels, and local administrators enjoyed vast discretion in making eligibility determinations.⁷⁰ By keeping all childless adults, all two-parent families, and virtually all adult males outside their ambit, AFDC and the other federal public assistance programs left "general assistance" strictly in state and local hands, where the classical nineteenth century liberal principle of poor

68. See Winifred Bell, *Aid To Dependent Children* (1963).

69. On the "maternalist" reformers and their conceptions of citizenship rights based on motherhood, see Skocpol, *Protecting Soldiers and Mothers*, *supra* note 29; Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890-1930* (1994); Sonya Michel, *Children's Interests/Mothers' Rights: The Shaping of America's Child Care Policy* (1999).

70. Bell, *supra* note 68, at 33-34, 63-65, 76-79, 81-82, 108-09.

relief—the principle of “less eligibility”—continued to hold sway: no one who lives on relief should be as well off as the least well off wage laborer; the amount and terms (over-bearing surveillance, punitive work-requirements, miserly provision) of relief must be more harsh and degrading than obtainable in the worst paid labor.⁷¹ The amounts, in the case of general assistance, even in the most generous states, did not even approximate the poverty level in the 1960s (nor do they today).

With states and localities determining eligibility and benefit rates, AFDC itself also served as a buttress to local low-wage labor markets. Thus, in the South, AFDC administrators deemed poor black women “employable mothers,” keeping them off the rolls when their labor was needed in the cotton fields.⁷² AFDC payments in the South, and indeed in most states, were, like general assistance, kept appreciably below official poverty levels.

Throughout the nation, local administrators in the early 1960s still vigorously enforced man-in-the-house rules. Through home visits, unannounced nighttime searches, and other means, they removed from the rolls any woman found to be associating with a man, especially if the man seemed to live in her house. In this fashion, welfare officers prevented public monies from supporting “immoral women” and “unsuitable mothers”; at the same time, they kept poor men from exploiting AFDC to escape any of the rigors of the low-wage labor market, or the responsibilities of supporting their offspring.⁷³

Even for its target universe of impoverished single parent families, AFDC reached a tiny fraction of the whole. Most did not even apply; of those who did, poverty-stricken newcomers to a locale met almost certain rejection. Since colonial times, wayfaring paupers had been “warned off” and forcibly excluded by the custodians of poor relief in the towns and counties to which they journeyed. Throughout the country, local custodians of AFDC resources carried on a modern version of this practice, refusing applications from otherwise eligible newcomers, if the local welfare officers determined that they had come for the purpose of receiving welfare. In New York, the very fact that you applied for welfare was presumptive proof of why you had come to the city. Rejected as ineligible, instead of welfare, you and your offspring got tickets on a Greyhound bus bound for home.⁷⁴ So, even in New York, the rolls stayed relatively small.

71. See *id.* at 16, 63-65, 82, 107, 139; Michael B. Katz, *Improving Poor People: The Welfare State, The “Underclass,” and Urban Schools as History* 28 (1995).

72. Bell, *supra* note 68, at 34-35, 42, 55, 79, 83, 130, 138; Katz, *supra* note 71, at 28.

73. See Katz, *supra* note 71, at 24-25, 29. See also Bell, *supra* note 68, at 4, 6, 80, 213 n.7; R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 57, 85-90, 98, 121-22, 130 (1994).

74. Michael Katz, *The Undeserving Poor: From the War on Poverty to the War*

Then, suddenly, starting in 1964, a vastly larger number of poor families began to get on to the rolls. By the end of the 1960s, AFDC had about four million beneficiaries, of whom roughly fifty percent were African-American.⁷⁵ Why this sudden burgeoning of welfare recipients? The reason was not black migration; that had occurred in the previous decades. Brought on by the mechanization of Southern agriculture, the wrenching displacement of some twenty million rural Southerners, including about five million African-Americans, began around 1940 and peaked in the 1950s. White Southern migrants settled largely in villages, towns, and smaller cities, often within the same state; blacks mainly moved to the largest cities of the North.⁷⁶

In all, between 1940 and 1960, about three million African-Americans arrived in New York, Chicago, Philadelphia, Detroit, Washington and Los Angeles, doubling the black population of those cities.⁷⁷ The men looked for industrial jobs. They met hardening race discrimination in many lines of work, like construction. At the same time, mechanization and automation in industries like steel and autos were eliminating tens of thousands of decently paid unskilled jobs; and the 1950s' recessions eliminated tens of thousands more.⁷⁸

During the 1940s and 1950s, the relief systems of the North and South did not respond to the want generated by the crisis of Southern agriculture. Neither in the rural South nor in the Southern and Northern cities did the welfare rolls rise significantly in the 1950s.⁷⁹ Instead, the "welfare explosion" occurred during several years of dramatic domestic protest—the greatest moment of civic disorder in the nation's history—marked by the epic confrontation in Birmingham, the wave of civil rights sit-ins, demonstrations, and near-riots that swept the South, and the "long hot summers" of protracted rioting and clashes with police in the North's black urban ghettos.⁸⁰

Prodded by the Johnson administration, Congress came forward with a series of programs, aimed at eradicating the "poverty amid

on Welfare 48 (1989). See also Melnick, *supra* note 73, at 77.

75. Frances Fox Piven & Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* 341 (1971). See also Katz, *supra* note 74, at 102, 106; Melnick, *supra* note 73, at 41, 73.

76. Piven & Cloward, *supra* note 75, at 215. See also Jacqueline Jones, *The Dispossessed: America's Underclass from the Civil War to the Present* 205-09, 224-32 (1992); Katz, *supra* note 74, at 84.

77. See Piven & Cloward, *supra* note 75, at 215. See also Nicholas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* 16, 70 (1991).

78. Piven & Cloward, *supra* note 75, at 214-17. See also Jones, *supra* note 76, at 233-38, 241-44; Katz, *supra* note 71, at 78-80; William J. Wilson, *When Work Disappears* 53-54 (1996).

79. Piven & Cloward, *supra* note 75, at 217-18. See also Bell, *supra* note 68, at 119, 154; Jones, *supra* note 76, at 258-61.

80. Piven & Cloward, *supra* note 75, at 222-46, 250; see also Ktz, *supra* note 71, at 27; Katz, *supra* note 74, at 106.

plenty" that civil rights protests and ghetto riots had put on the national agenda. Among these was the War on Poverty, whose programs would come to employ thousands of attorneys, and tens of thousands of social workers and poor community resident-activists.⁸¹ A great portion of them, we will see, set about getting poor people to apply for welfare and attacking the social and legal barriers to their receiving it. Centuries-old restrictions were broken down by a combination of civic unrest and federally-funded community organizing and litigation.

*B. A "Negroes' New Deal Thirty Years Late": The Civil Rights
Solution to Black Poverty*

Welfare was not what civil rights leaders demanded from the nation in response to urban black poverty and protest. The 1963 March on Washington for Jobs and Freedom and the 1965 Freedom Budget and Poor People's Campaign conveyed Martin Luther King's demands. King's advisor, Bayard Rustin, was a lieutenant of A. Phillip Randolph during Randolph's 1941 March on Washington campaign, and King made Rustin chief organizer of the 1963 March on Washington. In 1964 Rustin warned the Democratic National Convention that the "solution to our full citizenship" demanded more than "the Civil Rights Bill."⁸² It was "essential" but insufficient "to outlaw discrimination in employment when there are not enough [jobs] to go around." Civil rights, he told Congress the year before, "are built on the right to a decent livelihood" or they rest on sand.⁸³ Likewise, affirmative measures like job quotas for blacks were necessary, but without full employment policies they "risk[ed] making Negro workers into 'finks' in the eyes of white workers whose jobs they will take." Indeed, "it would be dangerous and misleading to call for [such measures] without at the same time calling attention to the declining number of employment opportunities in many fields." Rustin detailed the "displacement of lesser and unskilled workers" in the nation's "relatively high-wage heavy industries into which Negroes have moved since World War I" and the vast numbers of black workers cast aside each year by the "diminishing number of [decently paid unskilled and semi-skilled] jobs."⁸⁴ "We cannot have fair employment," he warned, "until we have full employment."⁸⁵

81. See Katz, *supra* note 74, at 95, 97-101; Lemann, *supra* note 77, at 133. See also Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* (1981); Joseph H. Helfgot, *Professional Reforming: Mobilization for Youth and the Failure of Social Science* (1981).

82. Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964), in Bayard Rustin Papers, Reel 3, at 27 (Univ. Pub. of America, Inc. 1988) [hereinafter Rustin Papers].

83. Bayard Rustin, Draft for Testimony on FEP, n.d., in Bayard Rustin Papers, *supra* note 82, reel 4.

84. *Id.* at 7.

85. *Id.* If decently paid unskilled jobs were evaporating, "the need of the nation

The "full emancipation and equality of Negroes and the poor," King repeatedly told rallies and demonstrations, legislative hearings and White House conferences, demanded a "contemporary social and economic Bill of Rights."⁸⁶ King's "Bill," like FDR's, emphasized decent incomes, education, housing, and full employment.⁸⁷ The initiative that fleshed out King's "Bill" was the Freedom Budget for All Americans. Its prompting came from the November, 1965 White House Civil Rights Conference, where King, Randolph and others underscored the inadequacy of the administration's anti-poverty programs; they provided job counseling but no jobs, they targeted black ghettos as a kind of "riot control" and fostered the "mischievous" notion that "the War on Poverty is solely to aid the colored poor."⁸⁸ In fact, the majority of the poor and economically disenfranchised were white, and there could be "no Negro program for economic citizenship."⁸⁹ Instead, King and Randolph proposed their Freedom Budget, a "multi-billion dollar social investment to destroy the racial ghettos of America, decently house both the black and white poor, and to create full and fair employment in the process."⁹⁰ Randolph compared the idea to the "social investments of the New Deal," noting that the New Deal's labor legislation and public investments did more than provide jobs and foster collective bargaining; they "evoked a new psychology of citizenship, a new militance and sense of dignity" among white workers, and so would

for skilled workers" was not. And enforcement of anti-discrimination measures might help Negroes gain footholds in the skilled crafts from which unions and employers had excluded them. This was essential. But by themselves such enforcement measures would make black demands for access seem "an attempt to steal white jobs." The civil rights movement would not willingly fall into this trap, when, in fact, public investment for the nation's "unmet needs in housing, education, health and transportation" could provide decent work for all. Bayard Rustin, *Lessons of the Long Hot Summer*, in Bayard Rustin Papers, *supra* note 82, reel 13 at 45-46.

86. Martin Luther King, Jr., *Where Do We Go From Here: Chaos or Community?* 193, 199-200 (1967).

87. *Id.* at 163, 193. King underscored the class-based character of his "Bill."

Any "Negro Bill of Rights" based upon the concept of compensatory treatment as a result of the years of cultural and economic deprivation resulting from racial discrimination . . . must give greater emphasis to the alleviation of economic and cultural backwardness on the part of the so-called "poor white." It is my opinion that many white workers whose economic condition is not too far removed from the economic condition of his black brother, will find it difficult to accept a "Negro Bill of Rights," which seeks to give special consideration to the Negro in the context of unemployment, joblessness, etc. and does not take into sufficient account their plight (that of the white worker).

David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 312 (1986) (quoting Dr. Martin Luther King, Jr.).

88. Rustin Papers, *supra* note 82, at 27.

89. White House Conference Transcript, in Rustin Papers, *supra* note 82, reel 5 at 23-24.

90. Bayard Rustin, *Untitled Article on the Freedom Budget*, in Rustin Papers, *supra* note 82, reel 13 at 1.

the Freedom Budget "among millions of Negroes." It would be "their New Deal thirty years late."⁹¹

The same genre of full employment policies was pressed on Congress and the President by the Autoworkers' president Walter Reuther and the industrial union wing of the AFL-CIO.⁹² More strikingly, these policies found bold champions among the New Dealers in the Kennedy and Johnson administrations, above all, in Johnson's Secretary of Labor, Willard Wirtz. Wirtz and others waged a sustained battle against the "partial and piecemeal" social services and work counseling approach being adopted by the War on Poverty. Eloquent in his carefully documented accounts of the "human slag heap" emerging in the nation's industrial regions, including its central cities where black unemployment already had begun to "explode," Wirtz urged regional and sectoral public investment, other incentives for job creation, and coordinated employment services and training.⁹³

Wirtz's thinking found a ready audience among many Democrats in Congress, who had been weaned on New Deal economic ideas and ideals. In 1963, Senator Joseph Clark of Pennsylvania presided over eight months of hearings on proposed new fair employment practices legislation, aimed at re-enacting some version of the war-time FEPC. Clark and other New Deal veterans in the Senate, including the powerful majority leader Hubert Humphrey, thought it plain that the problem of race discrimination in the nation's industries and workplaces could not be addressed apart from the factors Bayard Rustin had emphasized. Senator Clark echoed the words of Rustin and Randolph: "[W]e will not have fair employment until we have full employment and . . . Government must take the leadership in manpower and employment problems."⁹⁴ Every black leader who appeared before Clark's committee concurred. Even the cautious Whitney Young had

91. *Id.* at 8-9. When Randolph and King enlisted Leon Keyserling to lead a group of AFL-CIO, Department of Labor and academic economists charged with drafting a detailed program, they assured the project's continuities with the New Deal, for Keyserling had been a principal architect of both the Wagner Act and the original 1945 Full Employment Bill. Bayard Rustin, Memo to Gerhart Colm, et al., 12/9/65, in Rustin Papers, *supra* note 82, reel 12; Profile of Leon Keyserling, Freedom Budget Press Release in Rustin Papers, *supra* note 82, reel 12. For a detailed account of Keyserling's New Deal activities, see Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. Miami L. Rev. 285 (1987).

92. See Kevin Boyle, *The UAW and the Heyday of American Liberalism 1945-68* (1995); Nelson Lichtenstein, *The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor* (1995).

93. Memo, Willard Wirtz to Walter Heller, 11/19/63, Administrative History of the Department of Labor, Vol. III, Documentary Supplement, Sec. III-B, Box 5, LBJ Library. See generally Weir, *supra* note 66.

94. U.S. Senate, *Equal Employment Opportunity, Hearings Before the Subcommittee on Employment and Manpower of the Committee on Labor and Public Welfare*, 88th Cong. 1st Sess. 175 (1963) (remarks of Sen. Clark).

“no illusions that a complete absence of employment discrimination will . . . solve the problem of employment for many Negro citizens.”⁹⁵

Congress enacted Title VII of the 1964 Civil Rights Act to address employment discrimination. But the Freedom Budget/full employment ideas got nowhere. Most contemporaries explained their failure in terms of the escalating costs of waging the Vietnam War and LBJ’s desire for a cheap, quick fix for ghetto unrest. The impediments, in fact, were deeper. Among the capitalist democracies of the post-World War II world, the United States alone had not instituted a postwar economic policy that gave first priority to continued full employment. The defeat of full employment commitments meant that unemployment persisted in post-war America, often reaching depression levels in inner cities, rural regions, and the mid-west’s new rust belt. Unemployment became, once more, a fixed condition, a fact of nature. The echoes of New Deal full employment rhetoric in the pronouncements of Democrats like Clark and Humphrey rang hollow in the political context of the 1960s.

Committing the Democrats to the costly public investments and full employment priorities King demanded—and the New Deal liberals in Congress endorsed in principle—would have required mobilization and coalition-building on a much vaster scale than the civil rights movement. Perhaps a mobilized labor movement combined with civil rights forces would have been sufficient to compel LBJ and Congress to act, and business elites to acquiesce. But such a conjuncture was not in the cards. The UAW president, Walter Reuther and other progressive labor leaders supported King’s and Wirtz’s visions; but not the AFL-CIO leadership under George Meaney’s wing, and not Reuther’s own autoworker constituents. The latter, as Meaney pointedly observed, cared about the pensions, health plans, job training, and job security measures in their union contracts, not about raising hell until government provided these things for everyone. Industrial prosperity and Reuther’s own accomplishments at the bargaining table ensured that organized labor’s grievances now came in more administrable packages. The defeats social citizenship suffered in the late 1930s and early 1940s, when the whole CIO demanded it, and the “private welfare state” that its unions created in the 1950s and 1960s, meant that now the language of social and economic rights no longer resonated for organized workers.

C. The War on Poverty Fosters a Social Movement

Ghetto unrest amid industrial prosperity—this was the political landscape in which the War on Poverty was waged. It explains why a national response to black urban poverty was likely, and why large-scale social investments and job creation, the programs civil rights leaders deemed essential, were not what the response was likely to be.

95. *Id.* at 175 (remarks of Whitney Young).

Of course, it was not only the turbulence of the nation's urban black neighborhoods but also their votes that mattered. Urban blacks had been Democrats for almost four decades, but only in the aftermath of migration and protest did they begin to enjoy some substantial sway in the national party. The civil rights movement had forced the Democratic hand. Northern Democrats' support for civil rights measures estranged Southern white voters, and this combined with the concentration of African-Americans in a handful of large cities in populous Northern states to magnify the importance of the black vote and of wooing local black leaders. Somehow, the War on Poverty would have to deliver the goods to poor African-Americans in the big Northern cities, if not to end poverty or enfranchise the poor, then at least to quell anger and violence and to cultivate Democratic party ties.

Created by the Economic Opportunity Act of 1964 and headed by Sargent Shriver, the Office of Economic Opportunity was the War on Poverty's command center. Lodged in the White House, the OEO's chief architects and administrators mingled party pragmatism with high democratic ideals. From the OEO flowed an array of programs—vocational training, remedial education, college work-study grants, VISTA—and hundreds of millions of federal dollars for housing assistance, neighborhood improvement, and other antipoverty efforts, including the Community Action Agencies—to assure that poor people (and the ghetto poor, above all) enjoyed both access to services promised by the other programs, and participation in their governance and policymaking.⁹⁶

Of course, there was federal legislation to relieve poverty already on the books—public assistance, manpower development and training, public housing and mortgage assistance, urban renewal. These programs might have been expanded; the state and municipal agencies that received federal educational and welfare dollars could have gotten more, earmarked for poverty-stricken regions. For the most part, however, the War on Poverty added no dollars to existing programs, circumvented existing agencies, and instead, created new organizations in the “inner city” or “urban core”—the ghetto—and channeled hundreds of millions of dollars to them.⁹⁷

From the beginning, the OEO and Johnson's War on Poverty brain trust saw city government as a major impediment to reaching the ghetto poor.⁹⁸ If the federal money went to Northern city halls, they

96. Katz, *supra* note 74, at 80, 86, 88-89, 115-120; Lemann, *supra* note 77, at 157, 165-70, 202, 206.

97. Lemann, *supra* note 77, at 259-60. *See also* Sar A. Levitan, *The Great Society's Poor Law: A New Approach to Poverty* (1969); Daniel P. Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* (1969).

98. Pivens & Cloward, *supra* note 75, at 262; *see also* Katz, *supra* note 74, at 83-87, 95, 97-101.

feared that the white ethnic leaders of the Democratic city machines would direct little of it to ghetto voters. By the same token, if federal resources were given to state government agencies, there seemed little chance the resources would reach the black poor, since Northern state governments were largely in Republican hands, and the Southern states' Democratic leaders hardly could be expected to cooperate. So, instead, as one of the principal OEO policymakers put it, the War on Poverty tried "to set up competing institutions for the traditional services of government."⁹⁹

This hope for "basic changes" through "community action" inspired the controversial "maximum feasible participation" provisions in the Great Society's anti-poverty programs. Participation clauses grace countless federal statutes, but, as Piven and Cloward point out, "the Great Society programs went beyond . . . customary rituals."¹⁰⁰ Instead of token representation, federal officials authorized the hiring of tens of thousands of local community leaders, often veterans of local civil rights activism, allied them with thousands of social workers and lawyers, and stationed them in ghetto storefronts. From there "they badgered housing agencies to inspect slum buildings or pried loose payments from welfare departments."¹⁰¹ Soon, to the astonishment and ire of city politicians, they began to stage boycotts of "unresponsive" school systems, wage rent strikes against slum lords, and organize pickets outside public welfare departments.¹⁰² Sociologists Piven and Cloward were brilliant participant-observers, or perhaps organic intellectuals, of the welfare rights movement in New York City. I frequently rely on their insightful account.

Many Great Society programs sponsored local neighborhood agencies, but most—perhaps one thousand in all—were sponsored by the OEO, which directed its "Community Action Agencies" to help the poor gain access to jobs, job training, education and other government services, and to "assist the poor in developing autonomous and self-managed organizations . . . competent to exert political influence on behalf of their own self-interest."¹⁰³ These agencies were to be the War on Poverty's "competing institutions for the traditional services of government," the vehicles of "power redistribution" that Shriver and his OEO colleagues envisioned. This was not quite a mandate for a welfare rights movement, but it's not surprising that welfare proved a main object of the OEO's great experiment in empowering the poor. We have seen that massive job creation was probably the government initiative most black leaders thought most necessary, but it was one LBJ's policymakers thought

99. Piven & Cloward, *supra* note 75, at 262 (quoting William F. Haddad).

100. *Id.* at 266.

101. *Id.*

102. *Id.*

103. *Id.* at 271.

was out of reach. Still, at the outset, the goods that the anti-poverty warriors hoped to deliver was not welfare so much as education, housing, and job training; but these proved scarcer resources.¹⁰⁴

So it was that the social workers, former civil rights activists, and ghetto residents on the staffs of the new storefront community action agencies, like the Frederick Douglass Neighborhood Services in Harlem, the Stanton Street Neighborhood Services Center on New York's Lower East Side, or the Kenwood-Oakland Community Organization in Chicago's South End, became experts in welfare regulations.¹⁰⁵ Thousands and thousands of the neighborhood residents who visited these federally funded storefront agencies were eligible for public assistance but not receiving it; thousands more were being shortchanged. Combing the regulations, the community action workers found that AFDC mothers were entitled to, or at least eligible for, a larger budget than the welfare officials allotted them. Over time, they began to organize residents into groups with common claims and grievances. Instead of bargaining separately for fifty clients needing school and winter clothing grants, why not bargain once on behalf of fifty?¹⁰⁶

Thus, at Stanton Street, in the Fall of 1965 the agency's community organizer recruited a leader among the neighborhood AFDC mothers, she mustered others to make lists of winter clothing needs, and a committee was formed to act as an informal bargaining agent for the group. First, letters were sent on each mother's behalf, listing her family's needs and reciting the departmental policy which allowed special winter clothing grants of roughly \$150 per family of four per year. Letters went unanswered, so the Stanton Street Committee of Welfare Families wrote New York's Commissioner of Welfare, and when he did not respond, the Committee sent a telegram threatening mass picketing. The Commissioner replied the same day, offering to meet with the Committee. At the meeting, he confirmed that the Committee's several hundred members were entitled to winter clothing allowances and would receive them. He also proposed a formal grievance procedure and agreed to recognize the Committee as a bargaining representative.¹⁰⁷ So, hundreds of Hispanic families on the Lower East Side received checks for winter clothing from the welfare department, and in the next year, scores of thousands more

104. *Id.* at 258, 260.

105. *Id.* at 290-305.

106. *Id.* at 290-94. *See also* Jack Katz, *Poor People's Lawyers in Transition* 95 (1982).

107. The Commissioner later observed that a top New York City welfare official had not met with a group of recipients since the Depression, when his predecessors negotiated with the Workers' Alliance. Plainly, this Commissioner (and many others around the country) were not unsympathetic, and probably saw in the mobilization of welfare clients a potential boost for their own efforts to enlarge welfare budgets. Piven & Cloward, *supra* note 75, at 294, 323-26.

AFDC mothers in New York joined similar campaigns, netting millions of dollars in new grants.¹⁰⁸

Thousands of AFDC mothers were trained as welfare rights advocates; many became—in the words of one social worker who observed the process in New York—“exceedingly effective negotiator[s] with the welfare department.”¹⁰⁹ “[L]ike most AFDC mothers,” this social worker remarked, these women had “seem[ed] to hold [themselves] in very low self-esteem, and to regard other welfare recipients in the same way. Now [they] give speeches, organize[] protest demonstrations, and negotiate[] with public officials.”¹¹⁰

Throughout the country welfare rights groups began to mount “mass benefit campaigns.” As in New York, they mimeographed and distributed applications for particular grants or allowances—school clothing, furniture, or transportation grants, for example, or utility allowances in rat-infested areas so that lights might be kept on at night. Assembled at the welfare center, they staged sit-ins, and often prompted the welfare departments to release the discretionary grants.¹¹¹ In Boston, welfare rights groups led by AFDC mothers staged a sit-in to protest the practice of summary terminations of welfare benefits and demand prior hearings. The police beat the demonstrators in the halls of the welfare office, precipitating the first major riot in the violent summer of 1967. Fear that repressive measures would provoke street violence led to more protracted sit-ins around the country and even greater readiness on officialdom’s part to grant the demands of the welfare rights demonstrators.¹¹²

At stake was what constituted one’s welfare entitlement: the budget that the welfare department allotted or the amount of money actually needed to meet basic needs, like winter clothing, new shoes for school, or a kitchen table and chairs. At stake also was dignity, not only as dignity finds expression in decent clothing or a table at which to sit with one’s family, but also in matters like midnight searches for men-in-the-house, or summary terminations without being notified or heard.¹¹³

108. See Felicia Kornbluh, *To Fulfill Their “Rightly Needs”: Consumerism and the National Welfare Rights Movement*, 69 *Radical Hist. Rev.* 76 (1997).

109. Piven & Cloward, *supra* note 75, at 298.

110. *Id.* at 294.

111. *Id.* at 324-25; Kornbluh, *supra* note 108, at 97; Katz, *supra* note 106, at 84-85. See also Larry R. Jackson & William A. Johnson, *Protest by the Poor: The Welfare Rights Movement in New York City* (1974); Jacqueline Pope, *Organizing Women on Welfare: Planning at the Grass Roots Level* (1986).

112. Piven & Cloward, *supra* note 75, at 330-36.

113. Sit-ins and threatened legal action by the Stanton Street Committee prompted the New York City department to halt these raids. Piven & Cloward, *supra* note 75, at 324-25. On both these aspects of dignity and welfare provision, see Lucie E. White, *Subordination, Rhetorical Survivor and Sunday Shoes: Notes on the Hearings of Mrs. G.*, 38 *Buffalo L. Rev.* 1 (1990).

From this welter of organizing activity, grievances and rights talk emerged a national organization and movement. In Spring, 1966, George Wiley left his post as associate national director of the Congress on Racial Equality to open the Poverty/Rights Action Center in Washington, D.C. Within CORE and the civil rights movement, Wiley had championed connecting black civil rights with economic concerns, particularly black urban poverty in the North.¹¹⁴ He described the Poverty/Rights Action Center as a meeting point of the civil rights and anti-poverty movements. Under Wiley's leadership that Center became the organizing vehicle for the National Welfare Rights Organization (NWRO), welding together welfare rights groups across the country and spurring the staffs of anti-poverty agencies to redouble their efforts among welfare recipients. In February 1967, leaders representing 200 welfare rights groups in 70 cities answered Wiley's call for a first national meeting. By 1969, NWRO claimed more than 100,000 dues-paying members in some 350 local organizations. The NWRO national chairman was Johnnie Tillmon, an AFDC mother from Watts who had organized the nation's first welfare rights group. Its vice-chairmen were Beulah Sanders, an AFDC recipient leader of the City-Wide Coordinating Committee of Welfare Groups in New York City, and Carmen Olivo, a recipient leader in New York's Lower East Side.¹¹⁵

*D. The NWRO and the Right to a "Guaranteed Adequate Income":
Gender, Race, and Citizenship in the Consumers' Republic*

The NWRO marked a genuine rupture in the history of American social movements; it broke sharply with the reform language bequeathed by previous movements for social and economic justice. The WRO broke the links these older movements forged between work and citizenship. Like the earlier movements for social citizenship, the WRO claimed decent income as a right; unlike them, it did not tie this right to wage work. As we've seen, generations of reformers had constructed the social citizenship ideal in a gendered fashion, around the workingman-citizen; social insurance would go to full-time (presumptively white male) waged workers, and to their economic dependents. Beginning in the 1900s, women reformers had built up a "maternalist" complement to this ideal, around the (presumptively native-born, white) widow with children, but no male breadwinner. Analogizing to the nation's first major social insurance program, the Civil War pensions, which reached the families of hundreds of thousands of union soldiers, these women fashioned

114. See August Meier & Elliott Rudwick, *CORE: A Study in the Civil Rights Movement* 334-36, 406-07 (1975); Nick Kotz & Mary Lynn Kotz, *A Passion for Equality: George Wiley and the Movement* (1977).

115. Piven & Cloward, *supra* note 75, at 322 n.28. See also Kotz & Kotz, *supra* note 114.

"mothers' pensions" programs. The predecessors to AFDC, these were state-based entitlements for women performing the valued service of child-rearing, as long as they refrained from both waged work and intimate relations with men.¹¹⁶

Until the work of Felicia Kornbluh, no chronicler had captured the distinctive rights consciousness and vision of citizenship fashioned by the welfare rights movement.¹¹⁷ As Kornbluh points out, the NWRO spurned both these older models of citizenship; its activists saw the citizen as a black woman, or a Latina or white working-class woman, raising children without regular financial help from a man.¹¹⁸ Unlike the early twentieth century "maternalists" whose thinking shaped AFDC, NWRO activists did not oppose wage work for mothers, nor did they think it right for the state to demand from women sexual and romantic abstinence in exchange for public assistance. But unlike post-war liberal feminists, they did not categorically endorse wage work for women or make sexual freedom a core value. "Waged work," Kornbluh remarks, "could be coercive as well as liberatory, and full-time child rearing on the economic margins a challenge as well as a joy."¹¹⁹ Women in the NWRO did not valorize one option over the other; instead they staunchly opposed a welfare state that forced citizens to choose a particular form of work, childcare, family structure or intimate association.

For them, a "Guaranteed Adequate Income" was an unconditional citizenship right, essential to equal respect, and an appropriate touchstone of equality in an affluent nation. That income would be available to both men and women regardless of whether they were in the labor market or whether they were raising children. The focus on income and not employment resonated with (what we'll see was) a widespread view in 1960s America that affluence had diminished the need for universal labor force participation. Income, not employment, also spoke to "modern women's" paradigmatic economic activity, the work of managing family and household through the consumer marketplace.

"Give Us Credit for Being Americans," read the NWRO's placards demanding Sears credit cards for welfare recipients.¹²⁰ The NWRO's was a consumers' republic. Poor black women had not been welcomed into the producers' republic of earlier reformers. And they had had enough experience with northern urban labor markets to

116. On the "maternalist" reformers and their conceptions of citizenship rights based on motherhood, see Skocpol, *Protecting Soldiers and Mothers*, *supra* note 29; Ladd-Taylor, *supra* note 69; Michel, *supra* note 69.

117. In addition to Kornbluh, *supra* note 108, and Kornbluh, *infra* note 121, see Felicia Kornbluh, *The Rise and Fall of Welfare Rights: Women, Poverty, and American Law* (forthcoming) [hereinafter Kornbluh, *Rise and Fall*].

118. See Kornbluh, *Rise and Fall*, *supra* note 117, at 6.

119. *Id.* at 6-7.

120. Kornbluh, *supra* note 108, at 84-94.

know that many black women who wanted a job could not find one, especially one with decent wages. As leaders and activists in the NWRO, these women defended the organization's demand for a guaranteed income as giving each of them the "right to decide herself whether she is needed by her children as a full time mother and whether she is able to . . . work" outside home.¹²¹ Nor were they willing to dignify work that left them "worse off than they were before."¹²² Those who could work, would work; but they must have "decent jobs with adequate wages."¹²³ A decent income could not be tied to participation in "dead end" work programs or to the bleak prospect of an unregulated, irregular, exploitative labor market. Rather a decent income was a matter of right; part of being treated like a human being, part of having one's dignity and freedom in 1960s America was being able to participate in the nation's consumer economy.¹²⁴ AFDC recipient spokeswomen made plain the indignities of being unable to afford decent clothes and even an occasional luxury. "[F]ood and rent is not all of life. Why shouldn't we be able to buy perfume once in a while . . . or even a watch. . . . Our children . . . don't have decent clothes [or] things that other children take for granted—enough school supplies, money for a class trip, a graduation suit or dress."¹²⁵

For his part, George Wiley knew about efforts to address inner city poverty by "completing the New Deal," as Labor Secretary Wirtz urged. Wiley had no brief against bold public investment and job creation in the deindustrializing cities. Rather, he took the measure of Johnson's War on Poverty and rightly decided that no such costly national commitments would be forthcoming, least of all in a fashion that would reach the poorest Americans. For welfare recipients, Wiley and the NWRO leadership believed, work programs were more likely to end in punishment than opportunity. So when Wiley and NWRO vice-chair Beulah Sanders of New York's City-Wide Coordinating Committee appeared before the Joint Economic Committee of Congress in 1968, they declared that the "way to do something about poverty is to give people the money they need to meet the basic necessities of life at least at a minimum level for health,

121. Draft Letter from NWRO President Johnnie Tillmon and George Wiley, to Robert Finch, Secretary of HEW, *quoted in* Felicia Kornbluh, *The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later*, 24 *Feminist Stud.* 65, 73 (1998).

122. Kornbluh, *supra* note 108 at 97. See also Kotz & Kotz, *supra* note 114, at 16-17.

123. Kornbluh, *supra* note 121, at 68.

124. See Kornbluh, *supra* note 108, at 78-79.

125. Kornbluh, *supra* note 121, at 72 (quoting Juliet Greenlaw, Statement of National Welfare Rights Organization to the Democratic Platform Hearing (Aug. 16, 1968)).

decency and dignity.”¹²⁶ Asked about work programs, they said they were coercive and demeaning; and pointed to a world of experience with programs that were just that.¹²⁷ Wiley shrewdly dissected the ways that employment-based federal social provision either excluded the work that poor people did, or was molded to the image of a household with a male breadwinner and stay-at-home wife – an image increasingly at odds with poor women’s lives.¹²⁸

That Congress and middle-class America would be forthcoming with a generous guaranteed income untethered to work today seems deluded. Today it seems wildly shortsighted to have spurned all talk of work programs and job training. Welfare rights were essential to meeting the immediate needs of the NWRO’s constituents; but welfare rights were no basis for ending the social and economic marginality and stigmatization of the black poor. Perhaps only by dint of mimicking AFDC could a social movement of the poorest, most powerless Americans have been forged. By making AFDC-eligible women the movement’s constituents, welfare rights organizers had something to offer in exchange for rank-and-file participation, and rank-and-file members developed some sense of efficacy and entitlement by gaining their demands from the nation’s welfare departments. Likewise, as we are about to see, AFDC provided a basis for substantial gains through litigation.

But mimicking AFDC came at a price. It led to the absence of poor men in a movement that claimed to represent the nation’s poor and their needs. As a consequence, it led to a rights rhetoric that downplayed the disappearance of decently paid unskilled industrial jobs from the nation’s old industrial regions and center cities. This was the social fact that leaders like King and Rustin had highlighted and called on Congress to remedy as a necessary condition for the “full emancipation and equality of Negroes and the poor.”

Instead, the War on Poverty provided organizers and attorneys to help wage a struggle for welfare rights. Gaining welfare as a matter of right would relieve unwarranted suffering and indignity. But it would not do enough to help poor blacks make their way into a shared social destiny of work and opportunity. Without other enabling rights to training, decent work, and childcare, welfare rights risked modernizing the historical badges and incidents of racial and economic subordination instead of abolishing them. Welfare rights risked saddling poor African-Americans with a new variant of the old racial imagery of blacks as idle and dependent.

126. *Id.* at 68 (quoting George Wiley, Testimony for the National Welfare Rights Organization Before the Fiscal Policies Sub-Committee of the Joint Economic Committee of the U.S. Congress (June 12, 1968)).

127. *Id.* See also Kotz & Kotz, *supra* note 114, at 277.

128. Kornbluh, *supra* note 121, at 68-69.

Toil outside the home always had been the lot of poor African-American women. In white Americans' social imagination, the "domestic sphere" ideal—that woman's work was in her home, rearing children and keeping house for husband or father—rarely extended to black women, certainly not to poor ones.¹²⁹ At a moment when increasing numbers of white working- and middle-class women were entering the waged labor force, it was unlikely that white America would accommodate a reform vision whose aim seemed to be affording poor black women the right to decide to enter the wage force or not. More important, without the other enabling rights just mentioned, which Wiley viewed so suspiciously, the vision did not do enough to enable poor black women (or men) to participate in that common destiny and the dignity it afforded.

In the late 1960s, however, a broad swathe of economists and social policy mavens agreed with the guaranteed income idea.¹³⁰ For a Milton Friedman, a miserly guaranteed income was the least bureaucratic, most efficient, and libertarian way to address the social costs of unrelieved poverty.¹³¹ A great many liberal economists also endorsed the idea. Often they viewed it as second-best to job creation, but concluded that the latter was too costly.¹³² Still others based their support on the (mistaken) view that jobs were disappearing in the wake of automation.¹³³ As unskilled and semi-skilled industrial jobs disappeared, they reasoned, one could no longer combat poverty through minimum wage laws or fair labor standards; one needed to provide decent incomes directly. And since American prosperity no longer depended on ample labor reserves, it was only sensible to do so. Liberal social policy mavens were also often moved by the history of the poor laws, the workhouse, and the more recent work programs Wiley and Sanders described, to view *any* effort to address poverty through work as illiberal.¹³⁴

Even in 1969, the year LBJ left Washington and Richard Nixon arrived—and the year Michelman published *Protecting the Poor*—a guaranteed income or broadly inclusive federal welfare rights continued to seem attainable. That year Nixon proposed abandoning AFDC, with its perverse exclusion of two-parent families and its disparate state-based eligibility standards and benefit levels, and replacing it with a uniform national program covering all families in need. Admitting that "this new system will cost more than welfare,"

129. See Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (1985).

130. See Mickey Kaus, *The End of Equality* 112-14 (1992).

131. *Id.* at 113.

132. *Id.* at 114.

133. *Id.* at 38. See also Ben B. Seligman, *Automation and the Work Force in The Guaranteed Income: Next Step in Economic Evolution?* 59-80 (Robert Theobald, ed., 1965); Shoshana Zuboff, *In the Age of the Smart Machine* (1988).

134. See Kaus, *supra* note 130, at 115.

Nixon explained that under his proposed family assistance plan “benefits would go to the working poor, as well as the non-working; to families with dependent children headed by a father, as well as to those headed by a mother; and a basic Federal minimum would be provided, the same in every state.”¹³⁵

If this ill-starred family assistance plan was a liberal step into the unknown, the existing welfare system was a “colossal failure,” “bringing states and cities to the brink of financial disaster, but . . . failing to meet the elementary human, social, and financial needs of the poor.”¹³⁶ This widely shared view that welfare needed dramatic change flowed from the burgeoning numbers of AFDC recipients and intensifying conflicts around their demands on and treatment by welfare departments—numbers and conflicts brought on by the social movement the Johnson White House had nurtured.

IV. WELFARE RIGHTS IN THE COURTS

A. The Federal Legal Services Program and the Welfare Rights Attorneys

That the needed change lay in a more uniform and universal, more rights-based regime was a sentiment lawyers and judges had a hand in shaping. From the beginning, the staffs and organizers at the OEO's Community Action Agencies had like-minded attorneys nearby, for the OEO also created and funded the new Legal Services Program. Within a year of its creation, OEO provided its Legal Services Program with a budget roughly double that of the nation's existing legal aid societies.¹³⁷ OEO also wanted Legal Services projects to develop a form of law practice sharply different from what Shriver and his staff saw as the conservative “charity case” approach of traditional legal aid offices.¹³⁸ They insisted that the Legal Services funds go toward creating “neighborhood law offices” chiefly in the nation's inner cities, and they demanded that these offices undertake new and controversial forms of representation, above all impact litigation aimed at reforming existing rules, regulations, and practices in areas like welfare and public and private housing.¹³⁹ By 1970, OEO

135. Richard M. Nixon, *Nationwide Radio and Television Address* (Aug. 8, 1969), quoted in Daniel P. Moynihan, *The Politics of a Guaranteed Income: The Nixon Administration and the Family Assistance Plan* 222-23 (1973). Also, the proposed plan scaled benefits “so it would always pay to work,” and it included work requirements for everyone but mothers of pre-school children, as well as additional daycare center funding, to encourage them to work as well. *Id.*

136. *Id.* at 221.

137. Piven & Cloward, *supra* note 75, at 306 n.18.

138. Katz, *supra* note 106, at 65-66.

139. Piven & Cloward, *supra* note 75, at 315.

had established some 300 legal services projects operating about 850 neighborhood law offices with about 2000 attorneys.¹⁴⁰

Working closely with community action agencies like Stanton Street and Kenwood-Oakland, hundreds of these LSO attorneys were drawn into welfare rights litigation, and OEO began to fund back-up centers in leading law schools—foremost was Columbia's Center on Social Welfare Policy and Law—to build up expertise, fashion test-case strategies, and train the storefront attorneys.¹⁴¹ Never had a reform movement's lawyers been so mindful of the "movement" character of their work. Young LSO attorneys frequently compared themselves with older counterparts at the ACLU and NAACP Legal Defense Fund. Unlike the latter, LSO lawyers meant to combine litigation with mobilization. Thus, they embraced the craft of test-case litigation, which the Legal Defense Fund had perfected, but Legal Services lawyers strove to be more attentive to the most deeply felt grievances of welfare recipients themselves. So they set about exploring with grassroots leaders which legal challenges held out the most promise for mobilizing the rank and file.¹⁴²

B. The "Fair Hearings" Campaign

When LSO attorneys brought *Goldberg v. Kelly*¹⁴³ to the Supreme Court, claiming pre-termination hearings as a procedural due process right, they were litigating an issue—summary terminations—which, as we have seen, had spawned sit-ins and mass demonstrations at welfare departments across the country.¹⁴⁴ The right to a hearing has not been treated kindly by critical legal scholars looking back on *Goldberg v. Kelly* and the welfare rights movement. It has seemed a quintessential lawyer's process-based reform, easily routinized within the welfare bureaucracy, its pursuit sapping movement energy and gaining nothing of substance.¹⁴⁵ In fact, welfare rights attorneys and activists were hardly unaware of the limitations and shortcomings of hearings

140. Katz, *supra* note 106, at 65-66.

141. *Id.* at 79-81; see also Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (1993); Martin Garbus, *Ready for the Defense* (1971); Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (1990); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. Rev. 361 (1965); Edward V. Sparer, *The Right to Welfare, in The Rights Of Americans: What They are—What They Should Be* (1971) [hereinafter Sparer, *The Right to Welfare*].

142. See Katz, *supra* note 106, at 65-66, 68-69, 78, 86, 90, 142-43; Melnick, *supra* note 73, at 65, 75-80.

143. 397 U.S. 254 (1970).

144. See Davis, *supra* note 141, at 101-03; Lawrence, *supra* note 141, at 133-34; Piven & Cloward, *supra* note 75, at 324.

145. See, e.g., William Simon, *Legal Entitlements, Bureaucracy and Class in the Welfare System*, 92 Yale L. J. 1198 (1983); William Simon, *Rights and Redistribution in the Welfare System*, 38 Stan. L. Rev. 1431 (1986); Mark Tushnet, *The Critique of Rights*, 47 SMU L. Rev. 23 (1993).

rights. Legal tactics could not replace direct action, and welfare hearings could yield bitter fruits; but, as Kornbluh points out, the demand for a hearing was one of the few levers in the welfare machinery that lent recipients any power at all.¹⁴⁶ The original Social Security Act of 1935 already provided for "fair hearings" to enable ADC recipients to challenge administrative decisions. OEO-funded attorneys first seized on these provisions, which had been dormant for the Act's first thirty years, in 1965, and used them—often in conjunction with demonstrations and picketing by welfare rights groups—to gain benefits, publicity and leverage for their clients. The offer of legal and practical help in claiming lost or denied AFDC benefits or basic needs grants was probably the most important currency that groups affiliated with NWRO could offer rank-and-file recruits.¹⁴⁷

Columbia's Center for Social Welfare Policy and the Law (CSWPL) led the *Goldberg v. Kelly* litigation; CSWPL also orchestrated the broader campaign waged by LSO lawyers around the country in what the Columbia back-up center called "the struggle to establish a legal right to an adequate welfare grant . . . for all persons in need of financial assistance."¹⁴⁸ CSWPL's first director was Ed Sparer, whose teaching and writings educated a generation of Legal Services attorneys about welfare rights advocacy.¹⁴⁹

Sparer's view of the "fair hearing" was an activist one. He held classes for AFDC recipients to train them to represent themselves in the hearings, and persuaded New York welfare rights organizers, and then national leaders like Wiley, to experiment with fair hearings. Wiley, for his part, envisioned using the fair hearing roughly as the civil rights movement had used legal tactics in Birmingham a few years earlier. There, the movement had flooded the courts and prisons with protestors aiming to make an oppressive state apparatus unmanageable and crisis-ridden.¹⁵⁰

For a brief season, the fair hearings campaigns waged by welfare rights groups in New York and elsewhere had just such an impact. Organizers delivered hundreds of fair hearing applications to welfare offices and accompanied them with pickets. The costs of conducting hearings encouraged the granting of "basic needs" and school clothing applications without quarrel. Kornbluh tells us that the chair of the New York State Board of Social Welfare declared that these

146. See Felicia Kornbluh, "Legal Civil Disobedience": *The National Welfare Rights Movement and Administrative Fair Hearings*, (unpublished manuscript on file with author).

147. See *id.*

148. Sparer, *The Right to Welfare*, *supra* note 141, at 65.

149. See *id.*; Davis, *supra* note 141, at 34-35; Sparer, *The Role of the Welfare Client's Lawyer*, *supra* note 141.

150. See Kornbluh, *supra* note 146, at 4-5.

campaigns came “close to breaking down the system’.” The campaigns drove the head of New York City’s Department of Social Services to conclude “that the federal government should take over responsibility for all welfare programs.”¹⁵¹

For welfare rights attorneys, pre-termination hearings held out much the same kind of promise. About *Goldberg v. Kelly*, Sparer later wrote that taking the case to the Supreme Court responded to the grass roots demand to be heard before losing one’s benefits. It was “part and parcel of the *organizing* strategy of the welfare rights movement, designed to amplify the organized forces—particularly the organized welfare recipient forces—of the movement.” A prior hearing would enable recipients to “talk back and resist and still have some protection.”¹⁵²

We will return to the *Goldberg* Court’s significant utterances. From the point of view of welfare rights, though, by the time *Goldberg* was decided, the political tide had turned. White backlash and “taxpayers’ revolts” had prompted welfare reductions in many states. Some defrayed hearings costs by reducing benefits, and, as with all such tactics, New York’s welfare system had found ways to absorb mass hearings campaigns. Efforts to enable welfare recipients to represent themselves were faltering, and Legal Services or volunteer lawyers and law students were becoming scarcer. But we blunder if we blame *Goldberg* for the tides that swamped it.

C. The Welfare Rights Legal Strategy

In his most comprehensive account of the welfare rights lawyers’ strategy, Sparer explained that the “initial legal and organizational strategy” was “directed against exclusions of needy citizens who fall *within* the federal categories.” However, the “long-range goal . . . during the 1965-1970 period was to end the categorical nature of the welfare system.”¹⁵³ In the courts, statutory construction could carry a good deal of the burden of eliminating state-imposed eligibility requirements and state and local “tests for aid and exclusions from aid . . . [that were] unrelated to need.”¹⁵⁴ The second goal—ending the categorical nature of federal welfare in favor of a universal entitlement—was one that only constitutional adjudication could

151. See *id.* at 12-13.

152. Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509, 563 (1984). Prior hearings responded in some modest measure to the dignitary aspirations of the movement. See White, *supra* note 113. For a number of years the cost of providing prior hearings also prompted many welfare departments to accede to various extensions of benefits to entire groups of recipients where previously they would have terminated those benefits. See Piven & Cloward, *supra* note 75, at 310, 324.

153. Sparer, *The Right to Welfare*, *supra* note 141, at 67.

154. *Id.* at 66-67.

accomplish in the courts, and of course, the Court's Constitution stopped well short of it.

Even reaching the threshold of Sparer's first strategy—challenging state and locally imposed tests and exclusions—required many doctrinal innovations, which LSO attorneys gained in the federal courts. It demanded recognizing a private right of action against the state welfare agencies that administered AFDC,¹⁵⁵ revising or ignoring jurisdictional rules that seemed to bar the way,¹⁵⁶ and spurning the conventional remedy of federal funding cut-offs in favor of injunctive relief.¹⁵⁷ Above all, it required reversing the view, shared by judges, welfare administrators, and members of Congress alike for the first thirty years of AFDC's existence, that under AFDC states had authority to run their own programs, imposing such conditions and standards as they chose, subject only to a handful of limitations listed in the federal statute.¹⁵⁸

In place of that view, and the wide berth it left for state discretion, came a new presumption: a heavy burden lay on state lawmakers and administrators to justify any exclusion, test or condition that deviated from the principle of "actual need." By persuading the federal courts to embrace this presumption and to wield it against hundreds of state rules excluding would-be AFDC recipients, the LSO attorneys went a long way toward realizing Sparer's initial goal.¹⁵⁹ Within the federal statutory categories, the federal courts in the 1960s and early 1970s proved remarkably willing to treat welfare under AFDC as a right of all needy individuals.

The leading case was *King v. Smith*,¹⁶⁰ which struck down an Alabama welfare rule—issued in 1964 by Governor George Wallace—against would-be recipients found to have a man living in the home or visiting frequently "for purpose of cohabiting." Children with such a "substitute parent" lost their AFDC eligibility. Under the rule, Alabama dropped 16,000 children—90% of them black—from the rolls. The three-judge court below had struck the rule down on equal protection grounds.¹⁶¹ At oral argument, however, plaintiff's LSO attorney sought a statutory ruling. "[I]f the decision goes off as the lower court's did, then very little will have been accomplished.

155. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1289 (1982).

156. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 534-35 n.5, 537, 541-42 (1974); *King v. Smith*, 392 U.S. 309, 312 n.3 (1968).

157. See Melnick, *supra* note 73, at 50.

158. See Bell, *supra* note 68; Martha Derthick, *The Influence of Federal Grants: Public Assistance in Massachusetts* (1970); Wilbur J. Cohen, *The Social Security Act of 1935: Reflections Fifty Years Later*, in *The Report of the Committee On Economic Security of 1935: The 50th Anniversary Edition* (1985).

159. See Davis, *supra* note 141; Lawrence, *supra* note 141.

160. 392 U.S. at 309.

161. *King v. Smith*, 277 F. Supp. 31 (M.D. Ala. 1967).

Even if we win in Alabama, HEW will not stop similar practices in other states [where man-in-the-house rules had no such discriminatory purpose or effect]."¹⁶² A statutory holding, "would give us all we wanted," providing "a way in which the narrowest of rulings would have the broadest of implications . . . [G]ive us," counsel asked the Court, "a decision interpreting the Social Security Act as having rejected the concept of a worthy and an unworthy poor."¹⁶³ And the Court did so, giving welfare rights attorneys a reading of the Act that would shape AFDC case law for the next two decades. In the face of legislative history that ran mostly to the contrary, a unanimous Supreme Court concluded that in 1935 Congress had intended that all "needy, dependent children" would be entitled to AFDC benefits, and that states and localities could not enforce their own narrower definitions of eligible parents. Thus, Alabama, in dispersing AFDC, could not decide that Mrs. Smith's occasional visitor and lover (a Mr. Williams with nine children of his own) was a "substitute parent" and breadwinner whose visits to Mrs. Smith disqualified her and her children from the federal entitlement.¹⁶⁴ Chief Justice Warren put aside a wealth of legislative history suggesting that Congress indeed did mean to allow states to apply their own standards of "moral character" and "suitability" (acquiescing, as we saw, to the Dixiecrats' insistence on retaining local control over poor relief). This history would have been quite relevant at one time, because the "social context" in 1935 was one in which the distinction between the "worthy" poor and the "undeserving" was generally accepted.¹⁶⁵ Now both society and Congress took a different view, "more sophisticated and enlightened than the 'worthy-person' concept of earlier times."¹⁶⁶ The evidence that the Congresses that enacted the various post-1935 amendments to AFDC shared the Warren Court's enlightened perspective was scant at best.¹⁶⁷ Nonetheless, the Chief Justice proceeded to read the preamble and statement of purpose of the 1935 Act itself to mean that AFDC "was designed to meet a need unmet by programs providing employment for breadwinners."¹⁶⁸ Thus, "at the same time that it intended to provide programs for the economic security and protection of *all* children . . . [Congress surely would not

162. Garbus, *supra* note 141, at 194-95.

163. *Id.*

164. *King*, 392 U.S. at 328-30.

165. *Id.* at 320, 324-35.

166. *Id.* at 324-25.

167. The year before, in 1967, Congress had enacted amendments to AFDC that penalized states if they failed to reduce the number of illegitimate children on AFDC. "Senator Robert Kennedy complained that 'the man-in-the-house rule emerges from the conference strengthened rather than weakened' and joined with other liberals in an unsuccessful effort to kill the conference report." Melnick, *supra* note 73, at 87 (quoting *Social Security Amendments of 1967—Conference Report, Congressional Record*, Dec. 14, 1967, p. 36785).

168. *King*, 392 U.S. at 328.

have allowed the states] arbitrarily to leave one class of destitute children entirely without meaningful protection.... Such an interpretation of congressional intent would be most unreasonable, and we decline to adopt it."¹⁶⁹

Relying on *King v. Smith*, LSO attorneys went on to challenge a wide variety of state practices. Most Northern states had their own, less draconian man-in-the-house rules, like New York's, which did not disqualify the family, but put some financial burden on the man involved. New York's "lodger" rule reduced the family's AFDC grant by an amount equal to the man's prorated share of the AFDC housing allowance.¹⁷⁰ The lower courts took a hard line against all such practices, and the Supreme Court upheld them, enshrining a principle of "actual availability."¹⁷¹ Thus, the much-resented man-in-the-house rule fell by the wayside, its defeat a victory for the social movement's vision of autonomy. The federal courts also halted the more general practice of attributing to AFDC families income from other persons—adult siblings, grandparents, or others—living with the family, but under no legal obligation to support it, unless the welfare agency could prove that such income was "actually available" to the family.¹⁷² Other forms of presumed income were successfully challenged, and the upshot was that courts indirectly increased family's benefits.

In the process of expanding their attack on man-in-the-house and other attributed income rules, the courts strengthened the general presumption against all types of state-imposed restrictions. Few facets of AFDC policy escaped scrutiny in the lower courts. State laws penalizing recipients for fraud; laws and regulations denying benefits to aliens; rules on verification procedure, foster care, and emergency assistance—were all struck down.¹⁷³ Likewise, state determinations of the standard of need came under review.¹⁷⁴

169. *Id.* at 330.

170. *Van Lare v. Hurley*, 421 U.S. 338, 340-42 (1975).

171. Melnick, *supra* note 73, at 88-89. See, e.g., *Lewis v. Martin*, 397 U.S. 552 (1970).

172. Melnick, *supra* note 73, at 89.

173. See, e.g., *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977); *Maryland v. Mathews*, 415 F. Supp. 1206 (D.D.C. 1976); *J.A. v. Riti*, 377 F. Supp. 1046 (D. N.J. 1974); *Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974); *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970).

174. This was a particularly hard judicial row to hoe, for, as we saw, in 1935 FDR and Congress felt compelled by the Dixiecrats to make such standards a purely local matter. In 1967, however, LBJ recommended that Congress require the states to update their standards of needs each year and to pay 100% of those standards. Congress adopted part of those recommendations, requiring cost-of-living adjustments and demanding that "any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." 42 U.S.C. § 602(a)(23) (1994). HEW, for its part, read the amendment in a way that conceded that states could nullify the cost-of-living adjustment simply by switching to a "percentage reduction" system, paying only part of each family's needs. See Robert L. Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A*

During the first thirty years of AFDC's existence, there had been but one reported federal case interpreting the statute. Then, between 1968 and 1975, the years Michelman wrote his first seminal pieces on welfare rights, the Supreme Court decided eighteen AFDC cases, and the lower federal courts decided hundreds more.¹⁷⁵ Chiefly through statutory construction, the federal judiciary had gone a great distance toward transforming a grant-in-aid to the states into a no-strings, no-stigma, national right to welfare. But statutory construction could go but so far. It could not establish a decent social minimum as a floor on welfare benefits, or even prevent the states from diminishing payments as they expanded coverage under judicial nudging.¹⁷⁶ And it could not challenge the exclusions inscribed in the statute's categorical system, forcing Congress to change the system into one embracing all of the nation's poor. If courts were to force these changes, it would be through constitutional adjudication.

At first, LSO relied heavily on constitutional challenges. Residency requirements, as we saw, carried forward a centuries-old tradition of localities "warning out" wayfaring paupers. Nine out of eleven lower courts agreed with welfare rights groups and the LSO that these requirements trenched on the welfare recipient's "right to travel"; to be a member of the national community had always included the right freely to travel among the states. In *Shapiro v. Thompson*, the Supreme Court agreed that the states' residency requirements unconstitutionally burdened poor Americans' enjoyment of that right.¹⁷⁷ More than that, Justice Brennan, writing for the Court,

Case Study in Welfare Administration, 118 U. Pa. L. Rev. 1143, 1150 (1970). The NWRO and LSO went to court, arguing that Congress meant that AFDC recipients must enjoy a real increase in benefits as a result of the mandated adjustments. A three-judge court in New York agreed. Judge Jack Weinstein concluded that HEW's narrow reading of the provision "render[ed] the statute virtually meaningless." *Rosado v. Wyman*, 304 F. Supp. 1356, 1378 (E.D.N.Y. 1969). "[B]y encouraging states to switch to percentage reduction systems," HEW's interpretation of the amendment "is likely to lead to lower payments." *Id.* at 1379. The Supreme Court, however, refused to read the amendment's "ambiguous language" to establish a national floor for benefit levels. According to Justice Harlan, the provision had more modest purposes: to "require [the] States to face up realistically to the magnitude of the public assistance requirement," and "to prod the States to apportion their payments on a more equitable basis." *Rosado v. Wyman*, 397 U.S. 397, 412-13 (1970). The upshot as Judge Weinstein had predicted, was that many states responded to rising AFDC costs by instituting "percentage reduction" systems. Looking back on *Rosado*, Edward Sparer concluded that the case was "a disaster. It is one thing to force a state to raise its standard of need; it is another to prevent a state from lowering its actual payment level." And this latter goal, Sparer and LSO never attained. See Sparer, *The Right to Welfare*, *supra* note 141, at 79.

175. See generally Lawrence, *supra* note 141.

176. See *Rosado*, 397 U.S. at 397, discussed *supra* at note 174.

177. 394 U.S. 618, 629-31 (1969). On the lower court litigation and rulings against residency requirements, see Frank S. Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 Wisc. L. Rev. 1.

seemed to suggest (Justice Black, in dissent, called it a "cryptic suggestion"¹⁷⁸) that strict scrutiny, applying the compelling state interest test to the residency requirement, might be justified for another reason—not the right to travel, but the fact that welfare affects "the ability of the families to obtain the very means to subsist."¹⁷⁹

D. The "New Property": Cultural Resonance, Normative Ambiguity

Likewise, eight lower courts heard LSO challenges to states' summary termination practices, and six held that the due process clause required pre-termination hearings. In 1970, with its decision in *Goldberg v. Kelly*, the Supreme Court upheld the majority view.¹⁸⁰

Declaring that welfare benefits were "a matter of statutory entitlement," whose "termination involves state action that adjudicates important rights," *Goldberg v. Kelly* encapsulated the past five years of federal litigation and decisional law.¹⁸¹ By recognizing private rights of action, stripping broad swathes of discretionary power from local officials, and eliminating non-need based eligibility criteria, this new body of law had made welfare benefits into just such rights. The Court seemed to go further, stating more fully and forcefully than ever before the sociological premises behind the "more sophisticated and enlightened" view of welfare it had evoked (and attributed to Congress) in *King v. Smith*. In a footnote to its assertion that welfare benefits were "a matter of statutory entitlement," the Court observed,

It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations . . . social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor

178. *Shapiro*, 394 U.S. at 661 (Black, J. dissenting).

179. *Id.* at 627.

180. See Bloch, *supra* note 177; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

181. 397 U.S. at 262.

whose entitlements, although recognized by public policy, have not been effectively enforced."¹⁸²

The long quotation was from one of Charles Reich's two enormously influential articles on the "new property," published in Yale Law Journal in 1964-65.¹⁸³ It is an argument about the status of welfare in an era in which "government largess" takes myriad forms and constitutes so much of individual and corporate wealth. In Reich's account, the welfare recipient belonged to a whole social order of Americans "liv[ing] on government largess."¹⁸⁴ "Social insurance substitutes for savings; [and] a government contract replaces a businessman's customers and goodwill,"¹⁸⁵ while in between the new pauper and pensioner and the new businessmen stood petty entrepreneurs and tradesmen, the cab driver dependent on his medallion, the tavern keeper and the hunting guide whose livelihoods hinged on their licenses.¹⁸⁶ In Reich's anxious and nostalgic liberal narrative of American life, political and cultural antagonists—the cab driver or tradesman and the welfare mother, the factory owner and the union worker—were united by their common vulnerability to the state.¹⁸⁷ In fact, precious few of Reich's disparate forms of "new property" were new.¹⁸⁸ But the assimilation of pauper to tradesman and franchise-holder, the equation of welfare benefits with professional licenses and government contracts, were dramatically new, and this equation did the important discursive and doctrinal work. The "new property" unlike the old was "dispensed by the state . . . in the form of rights or status rather than tangible goods."¹⁸⁹ How, then, Reich asked, can the new property fulfill the "social function of the old property"? How can it serve as an "institution that secures the individual a measure of independence from state domination," when it "is itself dispensed by the state"?¹⁹⁰ The question sounded in classical liberalism, and so did the answer. If government subsidies, contracts, pensions, and benefits were to serve as a basis for private autonomy and dignified existence, fulfilling the "social function of property," then these various forms of "largess"

182. *Id.* at 262 n.8 (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *infra* note 183, at 1255).

183. See Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965) [*hereinafter* Reich, *Individual Rights and Social Welfare*].

184. Reich, *The New Property*, *supra* note 182, at 733.

185. *Id.*

186. See *id.* at 758.

187. Agency discretion wielded "life and death power" over the livelihoods of one and all. See *id.*

188. See William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (1996).

189. See Reich, *The New Property*, *supra* note 183, at 738.

190. See *id.*

must enjoy the same legal protections as traditional common-law forms of property.

In particular, the new property, like the old, must be protected against arbitrary deprivations and invasions by the state. What the state gave, the state could not take away—at least not without due process. And, in fact, Reich observed, due process case law already had begun in the 1950s to establish that the state could not take away such government-granted goods as an occupational license without a “hearing and standards of fairness.”¹⁹¹ Where the “freedom to earn a living” was implicated, courts recognized that procedural due process’ protections of property applied. But welfare too involved livelihood; like traditional livelihoods, it had the potential to provide “a secure minimum basis for individual well-being and dignity.”¹⁹² But only if the legal order recognized it too as a form of property.

For all its resonance, Reich’s argument left many questions dangling; and so did *Goldberg v. Kelly*. First, was the question of distributive justice. Conceding that welfare benefits, if recognized as secure legal entitlements, could perform the “social functions” Reich and the Court claimed for them, why were the poor entitled to them? On what distributive premise did they rest? On the face of it, welfare was not a moral equivalent to a professional license or a pension right in a union contract or even to government-based social insurance. One earned one’s license, one exchanged one’s labor for one’s union contract, and one made monthly contributions to one’s social insurance. Effort and exchange were the ordinary normative bases in liberal legal culture for such “property” claims. What was the normative argument that made welfare a cognate right, when on the face of it, welfare differed from the others by distributing goods with neither effort nor exchange to underpin the result?¹⁹³

Second was the question of whether the legal/constitutional order’s “recognition” of welfare as a right had only formal and procedural bite. If the social function of welfare as “property” was to provide “a secure minimum basis for individual well-being and dignity,” then did the “entitlement” not entail a measure of substantive constitutional protection—say, against lawmakers’ deciding to repeal the entitlement or to diminish it below the “minimum”? Or was that kind of recognition of the property-like aspect of welfare strictly a matter of public policy for legislatures to determine?

For Reich the right to welfare seemed to rest on the involuntary nature of individual poverty. “Today,” he wrote in the full text of the passage from which the *Goldberg* Court quoted:

191. *Id.* at 741.

192. *Id.* at 786.

193. This point is William Simon’s. See Simon, *Rights and Redistribution in the Welfare System*, *supra* note 145.

we see poverty as the consequence of large impersonal forces in a complex industrial society . . . [Past eras saw poverty as flowing from individual "idleness" and other moral failings.] It is closer to the truth to say that the poor are affirmative contributors to today's society, for we are so organized as virtually to compel this sacrifice by a segment of the population. Since the enactment of the Social Security Act, we have recognized that they have a right—not a mere privilege—to a minimal share in the commonwealth.¹⁹⁴

As an assertion about the commitments inscribed in the nation's statutes, this is bunk.¹⁹⁵ As moral reasoning, it also is somewhat odd. We may view compelled sacrifices as affirmative contributions to the commonwealth, but these tend to involve some measure of individual action—say, the sacrifices endured as a conscript in a national army. What Reich describes here is more like a casualty loss from the accident of poverty—or rather the accidental loss of a livelihood because American society is "so organized as virtually to compel" one's exclusion from the labor market. This would point toward welfare as a kind of just compensation.

Of course, the compensation clause is not where the Court looked for constitutional footing. "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty,"¹⁹⁶ the Court observed, citing and paraphrasing Reich.

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community Public assistance, then, is not mere charity, but a means to "promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."¹⁹⁷

So, the Court did not follow Reich in his blunt assertion that welfare was the poor person's just desert as a conscript in the reserve army of the unemployed. It did suggest that because supra-individual, social forces "contribute" to a person's poverty, welfare should be dignifying and not degrading. Reich's bleak quid pro quo rubbed abrasively against the ideal of equal opportunity. That ideal signified bringing the nation's poor into a shared world of work and opportunity, not compensating them for permanent exclusion from it.

194. Reich, *Individual Rights and Social Welfare*, *supra* note 183, at 1255.

195. As we have seen, the Social Security Act recognized no such right; it provided time-limited unemployment insurance and old-age pensions to those who contributed, mothers' pensions and public assistance for the blind and the elderly poor - those who could not presently or could no longer be expected to work, and nothing at all for the idle poor. See *supra* notes 68-81 and accompanying text.

196. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

197. *Id.* at 265.

So, the Court cast welfare not as compensation for the jobless poor's involuntary "contribution" to the economy, but as a means of bringing within their reach "opportunities . . . to participate . . . in the life of the community." Presumably, this meant that without means of subsistence, the poor could not begin to attain education and decent work or to participate in civic life. Participating in these spheres—not welfare as such—is the social basis of equal citizenship, which is why welfare was more the fruit of the New Deal's failure to enact social citizenship than its fulfillment. But by casting welfare provision, in the words of the Preamble, as a step toward including all Americans in a common framework of "Liberty" and "the general Welfare," the Court seemed to confirm that welfare had constitutional significance.

Later the same term, in *Dandridge v. Williams*,¹⁹⁸ the Court made plain that generous, justice-seeking statutory constructions and formal and procedural protections were as far as it would go in "promoting the general Welfare" with welfare rights:

The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad potential recipients.¹⁹⁹

V. MICHELMAN'S CONSTITUTIONAL WAR ON POVERTY

A. "Minimum Protection," "Just Wants," and "Basic Needs"

Dandridge lay ahead as Frank Michelman set to work on the unfinished normative underpinnings of constitutional welfare rights. The federal courts had labored mightily in statutory AFDC cases to make need the sole criterion for eligibility. Justice Brennan, in *Shapiro*, even had intimated that need of families for the very means of subsistence might become a member of the new constitutional family of fundamental interests, and thereby subject classifications in and exclusions from welfare statutes to strict scrutiny.²⁰⁰ But need had never stood on the same plane as effort or exchange in the distributive norms of common law or constitutional doctrine. Need needed an argument that sounded in distributive justice. Charles Reich's articles did not provide one.²⁰¹ Reich urged courts to attack official

198. 397 U.S. 471 (1970) (upholding state AFDC regulation setting ceiling on AFDC grant regardless of family size under rational relation standard of equal protection review).

199. *Id.* at 490.

200. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1968).

201. The text oversimplifies. Reich, as we saw, did gesture toward a justificatory

arbitrariness and discretion, and the insecurity and indignities they bred. He offered a sociological rationale for treating statutory welfare benefits as rights, but no moral or constitutional argument why courts were obliged to provide for the needy whom lawmakers had left out, or to remedy the shortfalls between statutory offerings and actual need. From the point of view of a legal scholar who sympathized with the welfare rights movement, the need-based right still needed arguments that extended beyond procedural to distributive justice and addressed the right's substantive reach and bounds.

Michelman set out in search of such arguments. He reported on his progress in two pioneering articles, *On Protecting the Poor Through the Fourteenth Amendment*,²⁰² Michelman's 1969 Harvard Foreword, which Lessig lit on as if in a different and distant world, and his 1973 *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*.²⁰³ *Protecting the Poor* was an effort to nudge doctrine and doctrinal scholarship toward a theory of judicially enforceable constitutional welfare rights. *In Pursuit of Constitutional Welfare Rights* was a reading of John Rawls' epoch-making book,²⁰⁴ examining how Rawls' theory bore on the idea of justiciable welfare rights, and how such an examination, in turn, might illuminate Rawls' theory.

"What," asked Michelman, is "the role of courts" in "the great War" on poverty?²⁰⁵ He answered with a reading of a handful of recent equal protection decisions—*Shapiro*,²⁰⁶ which had been decided in the 1968 term, *Harper v. Virginia Board of Elections*,²⁰⁷ *Douglas v. California*,²⁰⁸ and a few of their kin. Michelman dubbed these cases the Court's "contribution to the great War."²⁰⁹ *Shapiro*, *Harper*, and *Douglas* all could be read as resting, partly, on a notion of wealth discrimination.²¹⁰ Many lower courts²¹¹ and liberal commentators

argument based on exchange: welfare was just compensation for society's more or less conscious choice of a political economy that offered too few decently paid jobs to go around.

202. Michelman, *Protecting the Poor*, *supra* note 11, at 7.

203. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973) [hereinafter Michelman, *In Pursuit of Constitutional Welfare Rights*].

204. John Rawls, *A Theory Of Justice* (1971).

205. See Michelman, *Protecting the Poor*, *supra* note 11, at 8-9.

206. *Shapiro v. Thompson*, 394 U.S. 618 (1968).

207. 383 U.S. 663 (1966) (holding that the state may not condition franchise on payment of tax or fee).

208. 372 U.S. 353 (1963) (holding that the state must provide counsel to criminal accused on first appeal as of right, irrespective of court's assessment of probable merits).

209. See Michelman, *Protecting the Poor*, *supra* note 11, at 9.

210. *Harper* spoke of the "traditional disfavor" with which the Court regarded statutes discriminating on the basis of "wealth, like race," 383 U.S. at 668, *Douglas* of "that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's [assistance] . . . while the indigent . . . is forced to shift

wishfully read them as signs that the Court might bring the nation's poor into the "inner circle" of judicially protected classes.²¹²

For his part, Michelman read the decisions differently. The Court, he agreed, was embarking on "the elaboration of constitutional rights pertaining to the status of being poor,"²¹³ and it had clothed the decisions presaging these rights in the "verbiage of inequality and discrimination."²¹⁴ But the inchoate "theory of social justice . . . at the roots" of these cases was ill expressed in the language of "equality or evenhandedness."²¹⁵ Applying strict scrutiny to laws that fall unequally on the nation's poor would sweep too broadly; such government action is everywhere. Nor does equality offer a plausible benchmark for answering the question how much protection is "enough." "As much as" seems to provide just the certainty of measure which "enough of" so sorely lacks."²¹⁶ But would a court be comfortable explaining "why X is entitled to, say," as much legal assistance on his appeal as "Y in fact has rather than what justice requires?"²¹⁷ If equal protection, as applied to the plight of poverty,

for himself . . . [T]he evil [in such a situation] is . . . discrimination against the indigent." 372 U.S. at 358. "[A]n unconstitutional line has been drawn between rich and poor." *Id.* at 357. In his *Shapiro* dissent Justice Harlan lamented the majority's "cryptic suggestion" that welfare constituted a "fundamental interest" giving rise to the strict scrutiny/compelling state interest test the Court's emergent equal protection doctrine had begun to extend from suspect racial classifications to other invidious discriminations and fundamental constitutional interests nowhere evident in the constitutional text. 394 U.S. at 661.

211. Thus, the same year as Michelman's Foreword, see *supra* note 11, a three-judge district court in New York enjoined a recent change in the state's welfare regulations, which reduced public assistance payments in counties surrounding New York City to levels below those paid to city residents, when previously they had been grouped together. *Rothstein v. Wyman* 303 F. Supp. 339 (S.D.N.Y. 1969). Applying strict scrutiny to the new classifying scheme, the district court wrote, "[r]eceipt of welfare benefits may not at the present time constitute the exercise of a constitutional right"; nonetheless, the court deemed controlling the teaching *Harper* and *Shapiro*, that classifications creating "inequalities affecting the exercise of fundamental or critical personal rights" must be scrutinized under "a more stringent standard." *Id.* at 346. As in *Harper* and *Shapiro*, so here the court found a conjunction of a "fundamental right" and a "disadvantaged minority": only here the right was welfare and the minority, the poor. While welfare was only an incipient constitutional right, an emergent fundamental interest, *Shapiro* still seemed to mark the Court's acknowledgment that "[a]ccess to [the] bare necessities of life" was as "fundamental" as voting. *Id.* at 346-48. And *Douglas* marked a dawning recognition of the poor as a protected minority. *Id.*

212. See John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305, 365 (1969). See generally Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. Rev. 205 (1964); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969).

213. See Michelman, *Protecting the Poor*, *supra* note 11, at 16.

214. *Id.*

215. *Id.* at 10.

216. *Id.* at 18.

217. *Id.*

swept too broadly, it also stopped short of the mark, because equal protection implies "a state action qualification upon government's duties to relieve against hazards of poverty."²¹⁸ Yet, it was "less easy to be reconciled to the 'state action' notion when alleviation of certain, specially poignant hardships or crushing disadvantages is thought to be the object. [Then,] the government's noninvolvement . . . may come not as relief but as reproach."²¹⁹

Thus, while inequality and discrimination were the doctrinal notions near at hand, they were misleading. The upsetting feature in the equal protection cases involving poverty was not some odious discrimination that might accompany a poor person's deprivation of a good he couldn't afford; what was disturbing was the deprivation itself. So, Michelman sought to use the cases as data points from which to infer the outlines of a constitutional universe of "just wants" or "basic needs." Not equal protection, he insisted, but "minimum protection" was the heart of the matter.²²⁰ Focusing on specific deprivations of basic needs was "a much more manageable task" for courts. Michelman strapped himself to the mast of moderation, and vowed to keep "resolutely deaf" to the Court's superfluous equality rhetoric.²²¹ His was a more modest picture of the courts' part in ending poverty: "[not] railing against tides of economic inequality which they" can't stem, but "busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise."²²²

Apart from how modest or vaulting a vision of the courts' role this actually was, one could question how well it rendered the values and visions afoot in the cases. Especially in light of subsequent cases like *Dandridge v. Williams*,²²³ decided during the next term, it seems fairly clear that most of the justices in the *Shapiro*, *Harper*, and *Douglas* majorities harbored no "minimum protectionist" vision. They would make welfare an enforceable statutory right and interpret it broadly; they would not make it a constitutional right—except in its procedural dimensions (again, the next term in *Goldberg*). They would not compel states or Congress to make up any shortfall between statutory offerings and the real world of "brutal need," nor etch out a constitutional universe of just wants, nor subject state laws or practices that fell heavily or arbitrarily on the poor to any exacting constitutional standard. Not unless there were some other, more familiar constitutional value entwined in the case: the fairness of the

218. *Id.* at 11.

219. *Id.*

220. *Id.* at 13-14.

221. *Id.* at 33.

222. *Id.*

223. 397 U.S. 471 (1970) (upholding state AFDC regulation setting ceiling on AFDC grant regardless of family size under rational relation standard of equal protection review).

criminal process, ending the South's disenfranchisement of blacks and poor whites, vindicating the citizen's right to travel among the states of the Union free from discrimination.

Indeed, the idea that "lawyers in criminal courts are necessities, not luxuries"²²⁴ harked back to the 1930s and *Powell v. Alabama*²²⁵; it spoke to the Court's special solicitude for the integrity of the judicial process and its sensitivity toward the charge that "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot."²²⁶ *Harper*, striking down Virginia's poll tax, seems likely to have been a kin to *Powell* in most justices' minds. They more likely saw themselves completing the dismantling of Jim Crow, than identifying the first "islands of [economic] haven" on a constitutional map of basic needs and just wants.

What is important for us about *Protecting the Poor*, however, is not its failed prophecy about doctrinal developments, but its optimism about the open-ended quality of those developments and its identification of courts and author with the "great War" on poverty. Indeed, *Protecting the Poor* was a product of the "great War" in a material as well as a moral sense; we learn in its acknowledgments that the article "was prepared . . . with funds provided by The U.S. Office of Economic Opportunity."²²⁷ While he worked on it, Michelman was associated with The Harvard Center on Law and Education.²²⁸ An LSO back-up center, like CSWPL at Columbia, the Harvard Center litigated special education and school desegregation cases. It saw itself, much as the CSWPL did, battling against the intertwined evils of racism and poverty. Like the CSWPL, the Harvard Center trained scores of LSO attorneys and worked with community organizations, although it lacked some of CSWPL's and Sparer's "movement" tilt, and had nothing quite like their close ties with the NWRO.²²⁹

Intellectually, however, Michelman joined the NWRO and the attorneys and policy mavens surrounding it in their sharp break with inherited rights discourse. In contrast with the NWRO, *Protecting the Poor* and *In Pursuit of Constitutional Welfare Rights* do not defend a guaranteed income but instead a bundle of "insurance rights" (to

224. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding indigent felony defendants entitled to state-funded trial counsel under the Sixth Amendment).

225. 287 U.S. 45 (1932) (holding an indigent defendant in capital case entitled to state-financed counsel under the Sixth Amendment).

226. *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that the state must provide counsel to criminal accused on first appeal as of right, irrespective of court's assessment of probable merits).

227. Michelman, *Protecting the Poor*, *supra* note 11, at 7 n.*.

228. *See id.*

229. *See generally* Marion Wright Edelman, *Lanterns: A Memoir of Mentors* (1999). Edelman was a director of the Harvard Center on Law and Education.

food, shelter, health care, education). But in common with the NWRO, Michelman breaks the link with work. His constitutional welfare rights are unconditional. Thus, with the NWRO, Michelman rejects the centuries-old distinctions between "worthy" and "unworthy" candidates for public provision. There are no distinctions here between the disabled and able-bodied, the ill-fated and blameworthy, the widowed and promiscuous, the earnest job-seeker and the shiftless and idle.²³⁰ Instead, Michelman means to summon forth a theory of distributive justice that is insistently unsatisfied by a political economy affording "every one a fair opportunity"—through "full employment," "income transfers," and the like—to provide for everyone's basic needs or just wants. *Protecting the Poor* requires "more"; it requires basic needs or just wants "will be met when and as felt, [regardless of] . . . effort, thrift, or foresight."²³¹

Michelman does not dispute that justice requires the kind of political economy that enables everyone to make a decent living through decent work. At one point, he even notes that a participant in a Rawlsian assembly might well seek—in addition, and perhaps even prior to, insurance rights—assurance of some of social citizenship's mainstays in the form of full employment, income supplements and the like.²³² But apart from this passing observation, work in all its forms—waged and unwaged, dignifying and demeaning, decently rewarded and socially valued and not—does not figure at all in Michelman's account of the constitutional dimensions of the "great War" on poverty.²³³ In this, of course, Michelman departs from the social citizenship tradition. It sought to find or include these norms in the Constitution—to serve, in much the same terms that Michelman applies to welfare rights, as touchstones for "convincing advocacy" and "foothold[s] for challenging legislative judgments" that fell short of assuring decent work opportunities and decent livelihoods for all.²³⁴

230. Michelman welcomes the challenge—to answer the "compelling . . . objection to welfare rights, that such rights signify redistribution from the prudent and industrious to those who have culpably failed to grasp opportunities to provide for their own security." Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 969.

231. Michelman, *Protecting the Poor*, *supra* note 11, at 14.

232. *Id.* at 15 n.21.

233. One might think that such social citizenship principles as a right to work are absent from Michelman's constitutional theorizing, because they lie beyond anything courts could hope to contribute to the anti-poverty campaign. But it seems fair to say that for the Michelman of these two essays, "minimum protection" constitutes the full reach of the Constitution's—and not merely the constitutional courts'—"protection of the poor." No Constitution seen from the vantage point of civil society or of Congress would contain any different rights or equality norms. As we'll see, *infra* note 267, Michelman does address constitutional advocacy in political fora, and he casts the social minimum for constituting equal citizenship in the same mold.

234. Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 1002-03.

This lacuna results in an argument for welfare rights that assigns those rights social work they cannot do; they cannot secure the social bases of self respect and mutual respect in American life. Or so I will suggest. But I will do so in the context of a critical reading of Michelman's reading of Rawls, to which we must turn.

B. A Critical Reading of Michelman on Rawls

What was afoot in the courts shaped the way Michelman approached Rawls' *A Theory of Justice*.²³⁵ When Michelman turned in earnest to Rawls, he did so with a mind to asking

[h]ow . . . the book [bore] upon the work of legal investigators concerned or curious about recognition, through legal processes, of claimed affirmative rights (let us call them "welfare rights") to education, shelter, subsistence, health care and the like, or to the money these things cost.²³⁶

The answer was a vexed one. Michelman rested welfare rights on a distributive principle of "minimum protection" or "just wants." Rawls offered something different. The chief basis for welfare rights or for "the money these things cost" in *A Theory of Justice* was Rawls' difference principle.

The difference principle, you'll recall, states that institutionalized inequalities must be justified by dint of being in the interests of the least advantaged.²³⁷ Inequalities that do not redound to the benefit of those at the bottom are illegitimate. For Rawls, this principle is not cashed out through income standards or transfer payments alone; it must imbue the general "organization of the economy," and the distribution of wealth, power and authority as well as income.²³⁸ Because his focus rests on welfare, however, Michelman reads the difference principle with an eye to income. "Even apart from the quest for justiciability," he writes (and we will return to that quest), "the difference principle is unsatisfactory;"²³⁹ for Rawls seems interested simply in maximizing the income of those at the bottom, irrespective of whether that income is adequate to meeting basic needs,²⁴⁰ or whether it substantially exceeds that level.²⁴¹ Moreover,

235. See Rawls, *supra* note 204.

236. Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 962.

237. See Rawls, *supra* note 204, at 100-01. See also John Rawls, *Political Liberalism* 283 (1996) (Michelman explicates and criticizes the difference principle in *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 976-88.)

238. See Rawls, *supra* note 204, at 7-11, 54.

239. Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 982.

240. "A precept for the distribution of material social goods," writes Michelman, "which ignores claims regarding basic needs as such, and is sensitive only to claims regarding money income, will for many of us seem incomplete and thus not fully in harmony with our 'considered judgments.'" *Id.*

241. Michelman states:

Income-transfer activity is simply to be intensified just up to the point where

Michelman finds it difficult to feed the "primary good of self-respect" into the machinery of the difference principle, because the good of self-respect "does not seem to fit the difference principle's 'more is better' attitude."²⁴² Yet, from the point of view of liberal constitutional theory, the centrality of self-respect and equal respect in Rawls' theory are an important part of his appeal.

Michelman does find some support for a just wants/insurance rights approach to welfare elsewhere in Rawls' theory. While the difference principle is uncongenial, it is possible that Rawls' equal liberty principle or his principle of fair equality of opportunity, or even "justice as fairness" as a whole, implies a bundle of "insurance rights" such as Michelman is championing.²⁴³ Mainly, however, Michelman focuses on explicating and assessing the difference principle as a source of welfare rights.

Unlike the "more is better" attitude of Rawls' difference principle, Michelman's "just wants" theory provides a touchstone for determining the metes and bounds of welfare provision that seems directly tied to equal respect.²⁴⁴ Beyond the point at which welfare provides a decent minimum of social goods, it seems wiser to allow considerations of economic incentives and market efficiency to hold sway. As a rational actor behind Rawls' "veil of ignorance," one might well prefer assurance that one's "just wants" be satisfied, and for the rest one might prefer to wager that one's individual capacities were at least middling as the market measures things—and choose against the "more is better" attitude of the difference principle.

Certainly, Michelman makes a valuable point about the vulnerability of the difference principle from the point of view of

any further intensification lowers total output so much that the bottom's absolute income begins to fall even as its relative share of total consumer satisfaction continues to rise. Under the difference principle, that is all there is to it. There can be no implicit insurance-rights package because there is no concern for what the bottom spends (or is able to spend) its income on. Income is income—a primary, an elemental, social good, of which the bottom simply wants and is entitled to as much as it can get.

Id. at 981.

242. *Id.* at 983.

243. After all, fair equality of opportunity implies a right to education, and that right entails "subsistence or health or freedom from extreme environmental deprivation," for without them, "how could educational offerings effectuate fair equality of opportunity?" *Id.* at 989. So too, the "[e]njoyment of basic liberties" like freedom of speech has "fairly straightforward and objective biological entailments," which spell subsistence and the other insurance rights. *Id.* Finally, the "preeminent good of self-respect may imply welfare rights reaching beyond those biological entailments," although Michelman does not explore how. *Id.* at 990.

244. Michelman may have been the first sympathetic critic of Rawls to suggest that the difference principle and the income guarantee it entailed were not the only nor the most compelling principle that could be derived from Rawls' original position. A just wants principle might fit the bill better. For a thoughtful and nuanced later reading, making the case for a just wants approach, see Jeremy Waldron, *Liberal Rights* 225-49 (1993).

calibrating welfare rights or a minimum income. However, we risk being misled if we look at the difference principle only from this perspective. From it, we might surmise that what separates Rawls' views about social and economic rights from Michelman's is simply a quarrel over what form of income redistribution to enshrine in the Constitution—minimum income pegged to the difference principle, or minimum welfare rights pegged to just wants. In fact, neither of these alternatives captures Rawls' view of how the principles of justice, including the difference principle, bear on constitutional political economy. Rawls devotes great attention in *A Theory of Justice* to just this subject; what he writes makes plain, I think, that he would include constitutional baselines respecting work and participation in the economic order, as well as welfare.

Despite the tension he uncovers between the primary good of self respect and the "more is better" attitude of the difference principle applied to income, Michelman is right in suggesting that the difference principle is concerned with the social bases of self respect and mutual respect. Indeed, it concerns them more than it does the rational actor's calculus of consent regarding income shares. When Rawls writes about consent, he is concerned about what it takes to make each person a consenting member—a "charter member" in Jeremy Waldron's apt phrase—of society. He is concerned not only, or even primarily, with rational choice, but with contract, undertaking and commitment²⁴⁵—more precisely, with consent and commitment to the social enterprise, and, conversely, with the conditions which turn consent and commitment into submission and subjection. This is the problem Rawls dubs the "strains of commitment."²⁴⁶ Under an unjust political economy, such as ours, there are millions of citizens who cannot plausibly see themselves as members of a political community organized in their name to promote their interests and capacities. Instead of supporting their capacities for commitment we have strained them to a breaking point.

What, then, *are* the political-economic bases of consent and commitment? More important, writes Rawls, than "a high material standard of life" in securing "a just and good society . . . is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions."²⁴⁷ That is why, as you will recall, the difference principle reaches beyond income to the distribution of wealth and power; it

245. Rawls, *supra* note 204, at 176 ("[W]hen we enter an agreement we must be able to honor it even should the worst possibilities prove to be the case Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances.")

246. *Id.* at 145, 176, 423. I am indebted to Waldron's discussion of this theme in Rawls. See Waldron, *supra* note 244, at 259-67.

247. Waldron, *supra* note 244, at 290.

concerns shared authority no less than a fair share of goods. This is the key difference between Rawls' constitutional political economy—which he dubs a “property-owning democracy”—and the political economy of the welfare state. “In a welfare state,” he writes in a 1987 preface to *A Theory of Justice*, “the aim [of political institutions] is that none should fall below a decent standard of life By contrast, in a property-owning democracy the aim is to carry out the idea of society as a fair system of cooperation over time between citizens as free and equal persons.”²⁴⁸ The “background institutions of property-owning democracy . . . try to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy and indirectly political life itself.”²⁴⁹ The idea is “not simply to assist those who lose out through accident or misfortune (although this must be done), but instead to put all citizens in a position to manage their own affairs and to take part in social cooperation on a footing of mutual respect.”²⁵⁰

In brief, Rawls' precepts for political economy fall squarely within the social citizenship tradition. His political economy of citizenship bears a strong family resemblance to the Populists, Progressives and New Dealers we've canvassed. Like them, he holds that one cannot be a consenting, charter member, a “citizen,” of the national community without decent work, a measure of economic independence, and at least a small share of authority over the governance of one's work and shared economic life.

Whether one rests one's normative claim for welfare rights on some variant of Rawlsian liberalism, as Michelman does in the work we have been considering, or one relies on the republican tradition, as he does in the essays we take up later, a key part of the argument for welfare rights is this. These rights are necessary to secure the social bases of self-respect (the main concern in Rawls) and of independence and mutual respect or equal standing (republicanism's primary emphasis). In sum, welfare rights are necessary to a liberal republican (or if you prefer a republican liberal) conception of equal citizenship. Yet, plainly Rawls would insist that the social bases of equal citizenship consist of more than a decent minimum of food, shelter, and other material goods. They also demand a right to earn a livelihood through decent work; they require an opportunity to contribute in some recognized fashion to the social enterprise. This broader view of the material dimensions of constitutional equality is not only Rawls'; it also has a better mooring in the empirical literature that treats the social and economic underpinnings of self-respect²⁵¹

248. John Rawls, *Collected Papers* 419 (1999).

249. *Id.*

250. *Id.*

251. See, e.g., Wilson, *supra* note 78; Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. Soc.-Econ. 333 (1996); Amartya Sen,

and mutual respect²⁵² among women and men in today's America—and a better mooring in our constitutional history.

C. Justiciability as a Concern for Judicial Competence and Legitimacy

The family resemblance we found between Rawls and earlier proponents of social citizenship is one that critics like Sandel studiously smudge over, in order to claim that Rawls has abandoned the “formative project” of developing good citizens.²⁵³ Michelman is as careful and generous a reader as dwells in the republic of letters; he does not smudge over these aspects of Rawls’ political economy, but openly puts them aside to carry on with “minimum protection” and constitutional welfare rights. Probably Michelman would have invoked justiciability as reason enough to have put other social citizenship norms to one side, both in reading Rawls and in his own constitutional theorizing. “Justiciability,” indeed, was Michelman’s reason for seeking insurance rights, even though he conceded that it was “easier and more natural” to find in Rawls a right to a “guaranteed money income” or, more generally, a “right . . . against excessive or unnecessary inequality of wealth or income.”²⁵⁴ Justiciability has two dimensions here. The first concerns institutional capacity, or “judicial competence” in legal process-ese. The second concerns the degree to which a given norm is formally law-like, determinate, and objective in its application. This dimension of justiciability obtains whether the setting is the courtroom, the legislature, or the constitutional convention, when “constitutional amendment is the chosen avenue of reform.”²⁵⁵

The Penalties of Unemployment (Banca D'Italia, Working Paper No. 307, 1997).

252. Of course, complex patterns of respect, deference, and degradation form around class and occupational hierarchies, but all the empirical literature suggests that the most salient border between minimum respect and degradation in today's class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families, and those men and women at the bottom of the nation's class hierarchy who are not. See, e.g., Joel F. Handler & Yeheskel Hasenfeld, *We, the Poor People: Work, Poverty, and Welfare* (1997); Catherine S. Newman, *No Shame in My Game: The Working Poor in the Inner City* (1999). On the experience of women in regard to the identities of housewife and “[waged] working woman” and the dilemmas of self-respect and social recognition as a full and equal member of American society, see Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881 (2000) (arguing that for women no less than men, the right to participate in decent work is indispensable to equal citizenship; canvassing empirical literature showing that “a robust conception of equality [for women] can be best achieved *through* paid work, rather than *despite* it.” *Id.* at 1883).

253. Michael Sandel, *Democracy's Discontent* 6 (1996). See also Michael Sandel, *Liberalism and the Limits of Justice* (1982). Cf. Rawls, *supra* note 204, at 259 (Not only their capacity for self-respect but more broadly “the sort of persons [citizens] want to be as well as the sort of persons they are” are shaped by the political economy they live under.).

254. Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 966.

255. *Id.* at 967.

Regarding judicial competence, surely the short answer is, "compared to what?" Is a right to decent work really any more (or less) beyond judicial capacities or more insulting to separation of powers constraints than the rights to welfare, health care, and decent housing with which Michelman conjures? With the former as with the latter, a number of competency and separation of powers concerns arise, and a variety of judicial strategies are open.

The concerns and the strategies are familiar, and Michelman briefly surveys several.²⁵⁶ "[P]erplexing questions of economic feasibility" may arise; a decree fulfilling a "claimed housing [or employment] right" might "leav[e] the bottom worse off, on the whole, than it now is."²⁵⁷ But, says Michelman, such questions "do not seem different in essence from other issues that courts have deemed judicially triable."²⁵⁸ And in respect of housing and school finance, and hosts of other matters, judicial experience with complex litigation—and attendant forms of fact-finding—has grown since 1973. "More plausible is the notion of remedial incompetence."²⁵⁹ Courts have no way of enforcing such rights without the raising and appropriating of public funds and the creation of new administrative structures. Such actions are not only under the control of the other branches, but also "involves a complex of subsidiary but vitally important choices which the judiciary lacks all basis for making."²⁶⁰ One response to this problem is "a judicial mandate to legislative, executive, or administrative officers to prepare, submit, and carry out a corrective plan."²⁶¹

Separation of powers presents a different order of concern. Here, Rawlsian principles, on Michelman's account, may collide. Judicial vindication of substantive welfare rights may come at too high a cost "in participatory inequality [as between the judiciary's and the citizenry's respective roles in identifying the social rights to which a society's shared principles of justice commit it] which damages [the citizen's] self-respect."²⁶² The trade-off between "justice in participatory rights" and "justice in substantive rights," may demand judicial forbearance. Or at least, it may demand that courts "not cut welfare rights out of the whole cloth of speculative moral theory."²⁶³

256. *See id.* at 1004-10.

257. *Id.*

258. *Id.* at 1006.

259. *Id.*

260. *Id.*

261. *Id.* Indeed, the plausibility of such an "action-forcing" remedial approach to a proposed right to decent work has recently been defended. *See* Mark Tushnet, *What is Constitutional about Progressive Constitutionalism?*, 4 Widener L. Symp. J. 19, 31 (1999) ("Although judicial enforcement would not guarantee that everyone has a decent job, enforcement [of an order that the legislature offers plans for relief] could guarantee that legislatures make jobs policy a high or higher priority.").

262. *Id.* at 1010.

263. *Id.*

But such judgments do not exhaust the question of whether judges should ever allow such a theory to inform their application of "due process and equal protection guarantees in their formal and non-substantive aspects" to statutory materials. Here Michelman takes inspiration from the lower federal courts' pre-*Dandridge* readiness to find in equal protection a command to invalidate even seemingly plausible classifications among potential eligibles²⁶⁴ and generally to put the statutory programs' limitations and qualifications under strain, in the name of making need alone the valid criterion. Too, he finds in cases like *King v. Smith* studies of how courts can find in AFDC and kindred legislation statutory rights that amounted to "justice-inspired [legislative] supplementation of the constitutional catalogue."²⁶⁵ Certainly, this is a credible way to interpret the Court's reading of Congress' intent against the grain of legislative history and of Congress' knowing acquiescence in state practices the Court went on to condemn. Unprepared to declare the existence of such a constitutional right (and so openly and irrevocably to constrain Congress), the Court nonetheless was prepared to expand and deepen the limited and qualified commitments Congress had made.

Not only is this a plausible reconstruction of the interaction between Court and Congress, but it is suggestive of how a judiciary mindful of the constitutional dimensions of work and participation could read statutory material in the area of labor and employment.²⁶⁶ In the case of statutory work and employment rights, however, a court would not need to rely on "enlightened" contemporary notions of democracy and justice. Nudging state or federal agencies to construe their congressional mandates in ways that leaned toward inclusion or actual availability of work opportunities, courts could proceed in a somewhat more conservative interpretative style, relying on old, not emerging or "enlightened," understandings of equal rights and constitutional equality.

D. Justiciability as Mechanical Applicability

In Search of Constitutional Welfare Rights holds that welfare rights are the best vocabulary for expressing a constitutional commitment to a social minimum, partly because of their supposedly greater crispness and formal, determinate judicial applicability. Donning the hat of counselor to hypothetical Constitution-framers, and considering the problem from the point of view of advocacy outside the courts, Michelman invokes the same criterion. If you want to lay a basis for "convincing [constitutional] advocacy in political forums," then state

264. See *id.* at 1011-12.

265. *Id.* at 1011.

266. For a like-minded account of possible readings of the Wagner Act, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol and Workplace Co-operation*, 106 Harv. L. Rev. 1379 (1993).

your commitment to a social minimum in the form of "insurance rights." To rely on a more Rawlsian vocabulary "would [fail] to give . . . advocates any special foothold for challenging legislative judgments."²⁶⁷

Once more, a pertinent question for us is "compared to what?" Is the legal-rhetorical foothold supplied by a right to decent housing any more secure from contending interpretations, than that provided by a right to decent work?²⁶⁸ We need not belabor the point. Michelman concedes it in his contribution here.

If we . . . compare a social-citizenship conception with a welfare-right conception of a positive constitutional guarantee in the economic sphere, we can see that neither sort of conception trumps the other on the scale of justiciability.²⁶⁹

Indeed, the examples Michelman chooses are those we've been employing. He points to the welfare right found in the present South African Constitution, "to have access to adequate housing," a welfare right whose "progressive realization" the state must take "reasonable" steps "to achieve." And he asks whether such a right registers any higher on the scale of justiciability "than would a declared duty of the state to do the best it can to maintain an economy and society in which everyone who wants it has access to respectable, fulfilling adequately remunerated work."²⁷⁰ The answer, of course, is no.

The next question is "so what?" Even assuming there are important differences in the justiciability of various social rights, should justiciability determine which of those rights to constitutionalize, when their field of application lies first and foremost in the realm of public political deliberation and policy-making? Courts, that is, will not be called on to interpret them except in the context of antecedent interpretation and enactment by lawmakers. Once more, Michelman today concedes the point—and, indeed, makes the counter-argument. If the welfare-right conception has an edge in respect of "concerns about constitutional-legal form," it is on the scale of what Michelman now calls "narrowness."²⁷¹ This is a

267. Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 203, at 1002-03.

268. In fairness, we should note that Michelman's point of comparison lay between insurance rights and Rawls' difference principle. Rawls would point out that the principle is intended to apply across a range of laws and institutions, much like Equal Protection. It would figure in what Michelman now nicely refers to as "the [democratic] practice by which we test, exchange, revise . . . the constitutional-interpretive judgments [that decide] . . . from time to time, the 'institutional settlements' we need." See Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 *Fordham L. Rev.* 1893 (2001). Over time, this practice gives normative and narrative content and push to the most general equality norms.

269. *Id.* at 1896.

270. *Id.*

271. *Id.* at 1895-96.

concern distinct from justiciability. It does not concern courts' remedial competence or democratic deficits, nor whether a given norm is too general and wide-open-to-competing-interpretations. Rather, it concerns how widely or narrowly a norm "preempt[s] major public policy choices from the ordinary politics of democratic debate and decision."²⁷² More than a welfare right, a constitutional social-citizenship right "reach[es] in a hundred directions, into the deepest redoubts of the common law and the most basic choices of political economy a modern society can make."²⁷³ Certainly, if I am right about the way these rights have figured in public political discourse and debate about everything from railroads to currency to education to industrial organization, then Michelman is right. And note: Michelman's point pertains independently of the scope of judicial enforceability, as long as we presume our public officials to be conscientious. It is the latter to whom social citizenship's claims always have been addressed. Michelman's current thinking has merged with that reform tradition's conception of how its norms would bear on democratic lawmaking—not via judicial review, but instead by directly guiding and constraining participants (and the standards they apply and the arguments they offer) in debates and decisions about public policy-making.

Over against the charge of non-"narrowness" or democracy-stymying, Michelman offers a defense on behalf of social citizenship norms. It is precisely the "blatant 'non-justiciability' of a social-citizenship right—its utter lack of mechanical applicability to any hard or contested question of public policy"—that "saves it from charges of contrariety to democracy."²⁷⁴ Instead of thwarting democracy, social citizenship norms would mark a "gain for democracy" by "imposing a certain constraint on how citizens and their elected representatives would frame and approach sundry questions of public policy." That is, the norms would demand of all concerned an "exercise of *judgment* about which choice will best conduce to the social citizenship of everyone"—much as the 1940s ALI notables had envisioned.

By invoking Michelman present to respond to Michelman past, we have strayed from Michelman on Rawls and welfare rights in 1973. The burden of this foray into the present has been to suggest that Michelman's erstwhile insistence on the justiciability of social and economic rights in non-judicial fora was a product of the politics and doctrine of the day. Welfare rights seemed politically possible and possibly immanent in doctrinal developments; an inspiring movement was pressing for them, and this motivated a search for arguments. Some have proved strained. One of these was the contention that welfare rights were strongly justiciable, in contrast to other possible

272. *Id.* at 1895.

273. *Id.* at 1897.

274. *Id.* at 1898.

ways of constitutionalizing a social minimum or social citizenship. Also strained was the premise that justiciability—objective and mechanical application—ought to matter much when the arenas of norm application were public political debate over, and legislative hammering out of, public policy. In prescribing for those arenas, we do better to focus on the substance of our substantive norms, and on that count we do better to follow the path of social citizenship down which Rawls' guidance more naturally points us.

There is more to say about the interaction of social citizenship norms and democratic politics and lawmaking, and more of Michelman's insights and qualms to which to respond. But further consideration should await a reading of Michelman's republican case for welfare rights. This brings us to his turn to history, and his thoughtful reading of Progressive constitutionalism.

V. A REPUBLICAN CASE FOR WELFARE RIGHTS

A. *The Distributive Dimension of Constitutional Property Rights and the Problem of Legal Form*

By the late 1970s, the Court had begun to cut the solicitous strands of doctrine well short of substantive welfare rights, declaring ever more categorically that its Constitution confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property."²⁷⁵ Liberal constitutional scholarship grew more theoretical and more historical as the Court grew more conservative. Theorists acknowledged the limits of judicial competence and legitimacy in the area of affirmative rights. They began to reflect on the "gap between the reach of constitutional case law and the reach of the Constitution."²⁷⁶ They built up more general, less court-centered accounts of constitutional democracy as a system of self-government.

For his part, Michelman made civic republicanism and contemporary pragmatism and critical theory his own, and brought them into an internal dialogue with liberal constitutional theory. Out of this emerged a profound series of reflections on the dilemmas of constitutional self-government, the tensions between popular sovereignty and the rule of law, the nature of adjudication, and, most germane here, the "possessive" and "distributive" conceptions of constitutional property rights.²⁷⁷ Written in 1986, Michelman's

275. See *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989).

276. See Sager, *supra* note 15, at 419.

277. See, e.g., Frank Michelman & Margaret Jane Radin, *Symposium Commentary: Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L. Rev. 1019 (1991); Frank I. Michelman, *Conceptions of Democracy in American Constitutional*

exploration of the tensions between these two kinds of property norms sets out to reconstruct the republican logic and history of the distributive side of constitutional property claims, to suggest why this side has been the recessive one in constitutional law, and to join issue with those, like Michael Walzer, who object for staunchly democratic reasons to the constitutionalization of "welfare claims as rights."²⁷⁸

Michelman seized hold of the "Founders" venerable republican conviction that "security of property holdings" was not just a matter of private self-interest; it was of general political concern. Material independence was viewed as indispensable if one's "independence and competence as a participant in public affairs was to be guaranteed."²⁷⁹ This maxim had obvious bearing on the antiredistributive, property-protecting provisions in the founders' Constitution; but it also implied a *distributive* imperative. This imperative too found support in much that the founders wrote and did. But it found no obvious expression in the provisions and architecture of their Constitution. The distributive norm was deferred, Michelman suggests. Given the prospect of westward expansion, the founding generation could envision "a freehold beneath every household . . . supporting the freeholder's independence."²⁸⁰ As long as this state of affairs continued, Michelman explains, in terms that evoke Roosevelt's constitutional narrative with uncanny precision, the Constitution's possessive regard for property was sufficient to answer the founders' distributive concerns.

By the end of the nineteenth century, however, a "Progressive critique" of this constitutional arrangement had emerged. With the rise of industrial capitalism, a regime of anti-redistributive property rights—so the critique ran—might itself "constitute undemocratic relations of power and subjection."²⁸¹ On this account, persons—wage earners, tenant farmers and others—"subjected to the proprietary power of others lacked . . . the material foundations of independent political competence."²⁸² In short, with the rise of large-scale corporate enterprise and its impact on the legal-political-intellectual culture of the late nineteenth century, the distributive and anti-

Argument: Voting Rights, 41 Fla. L. Rev. 443 (1989); Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986) [hereinafter Michelman, *Traces of Self-Government*].

278. See Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, *supra* note 277. The essay by Michael Walzer which Michelman addresses is Michael Walzer, *Philosophy and Democracy*, 9 Pol. Theory 379 (1981).

279. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, *supra* note 277, at 1329.

280. *Id.* at 1332.

281. *Id.* at 1335.

282. *Id.*

redistributive sides of our tradition's constitutional understanding of property claims were set on a collision course. Once it was firmly recognized that "uncontrolled so-called private power" exposes individuals to subjection, it behooved government to act. "Logically, however, the state cannot offer protection . . . by the same formal law that would protect absolutely against redistributive political 'interventions.'"²⁸³ Accordingly, while the Progressive critique largely succeeded in undoing the regime of anti-redistributive property norms, it did not succeed, on Michelman's account, in supplanting those norms with distributive ones. Indeed, Michelman implies that the Progressive reformers never sought to embed such distributive norms into constitutional discourse. They hardly could have hoped to do so, it appears in his view, since distributive norms, whatever their claim to constitutional status, seem to place an unbearable burden on our commitment to formally realizable, objective, "law"-like standards as the sole, legitimate *lingua franca* in the "province and discourse" of the Constitution.²⁸⁴

As you might guess, I am on all fours with Michelman and he with me all the way to the last point. There, as an historical and interpretative matter we seem to part ways in modest degree; for I read the Progressives, and their forebears and descendants, stretching from the 1880s-1940s—generations of reformers whom, following Michelman, for present purposes, I'll simply call Progressives—somewhat differently. As my brief sketch of Croly (a Progressive in the stricter sense) and his Populist predecessors and New Deal progeny all showed, these Progressives found no insoluble tension inherent in the effort to "cast *substantively appealing and defensible* distributive norms" as constitutional standards.²⁸⁵ They did not neglect "the classical negative understanding of fundamental rights"²⁸⁶ (how could they?); nor the appeal that understanding made to a deep-seated image of constitutional norms as "strongly objective"—abstract, simple, formal—and, thereby, law-like. But they treated the grip of these ideas on "the American constitutional imagination"²⁸⁷ as contingent and contestable—via tools Michelman knows well: pragmatism, context, a "living Constitution." Thus, as we saw, the need to make the constitutional tradition's distributive imperatives into direct claims against the state did not compel divorcing constitutional from political economic discourse; it did

283. *Id.* at 1336.

284. *See id.* at 1337.

285. *Id.* at 1321 (emphasis in original).

286. *Id.* (quoting David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 889 (1986)).

287. *Id.*

demand dethroning the courts and installing Congress and the "active branches" as the nation's new "constitutional political economists."²⁸⁸

In tandem with this reallocation of interpretive authority, we saw how Progressives set about the hermeneutic task of translating "the old and sacred possessive [common-law based and anti-redistributive] rights" of property and labor into new "social and economic rights," to enable "a return to values lost in the course of . . . economic development" and "a recovery" of the old rights' once robust social meaning.²⁸⁹ The "active branches" and the citizenry itself, so Progressives like Croly and the New Dealers contended, were better suited to the task of interpreting and applying the new "social meaning" of constitutional property norms—in part for the kinds of justiciability reasons Michelman highlights, but also because, as we saw in both Croly's theorizing and FDR's more popularly accessible constitutional discourse, they sought to advance a more dialogic and democratic mode of constitutional interpretation and decision-making.²⁹⁰

If I am right about this history, I do no more than provide an ancestry for Michelman's effort to unsettle our conventional understanding of the forms of constitutional law and democratic politics. Michelman's urging is this. If we can but relax the hold of our inherited ideal of legality in favor of a revised and more pragmatic one, then we might open the space for a fuller consideration of "distributive property claims" in the "province[] and discourse[] of constitutional law."²⁹¹

B. Republicanism Versus Welfare Rights

Perhaps because his attention rests so largely upon the seeming tension between distributive norms and "legal" ones, and perhaps because his proof text is Walzer's critique of the idea of constitutional legalization of welfare rights, welfare rights remain Michelman's only specification of what a modern distributive constitutional property

288. See *supra* note 32 and accompanying text.

289. See *supra* note 46 and accompanying text (quoting FDR). Nor were they unmindful of the problem Michelman identifies of mediating between distributive and possessive property claims. See Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, *supra* note 277, at 1321. Progressive reformers like Brandeis and Commons devoted vast attention to reconciling the various possessive property claims of employers with such social rights as minimum livelihoods and unemployment insurance and with the claims of employees, as of right, to a voice in the governance of the enterprise. It is true, though, that their efforts at reconciliation, while principled, did not take the form of "strongly objective standards" but were rather more contextual and pragmatic. See, e.g., John R. Commons, *Legal Foundations of Capitalism* (1924).

290. Compare Michelman, *Traces of Self-Government*, *supra* note 277, with Michelman & Radin, *supra* note 277.

291. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, *supra* note 277, at 1324.

claim—deserving of our more ample consideration—might be. As a result, another, perhaps equally deep tension goes unexplored. That is the tension between the modern welfare rights claim and the republican underpinning Michelman aims to provide for it.

Republican maxims hold that a measure of material independence is a necessary basis for political competence and standing. That is Michelman's normative baseline. But in the republican outlook he invokes, such citizenly standing and competence have always been bound up with the status of one who fulfills some recognized, responsible role in the social enterprise—one who "earns" her measure of material security and "independence."²⁹² We certainly may find, as far back as the seventeenth and eighteenth centuries, support in both "liberal" and "republican" texts for the view that the poor have a subsistence claim on society's resources. In truth, that claim was well-defended by Locke; it is there too in the writings of Adam Smith.²⁹³ But that is a far cry from making this longstanding claim a basis for citizenship in the sense of full membership in the political community. Neither Locke, nor Smith, nor Madison and Jefferson in the "republican" texts Michelman relies on,²⁹⁴ nor later renderings of liberalism and republicanism, up to and including Professors Rawls and Sandel—none of these lend support to the idea of making public assistance *simpliciter* the material base of citizenship. That base, that dignifying social minimum, must rest on some socially recognized contribution on a person's part to the common enterprise.

292. See William E. Forbath, *Ambiguities of Free Labor: Law and Labor in the Gilded Age*, 1985 Wis. L. Rev. 767 (tracing this theme in republican discourse of political and legal elites and labor reformers in U.S. from 1780s to 1880s); Forbath, *supra* note 22, at 13-15, 18-19, 26-51 (same, adding inflections of theme in women's, African-American, and agrarian movements, and carrying forward into 1890s-1930s).

293. Regarding Locke, see, e.g., John Locke, I Two Treatises of Government 42 (Peter Laslett ed. 1960) (poor man has a right to "Title to so much out of Another's Plenty as will keep him from extreme want"); Thomas A. Horne, Property Rights and Poverty 48-65 (1990); Richard Ashcraft, *Liberalism and the Problem of Poverty*, 6 Crit. Rev. 493 (1993) (Locke and classical liberalism emphasize natural right to subsistence). Regarding Smith, see, e.g., Adam Smith, II An Inquiry into the Nature and Causes of the Wealth of Nations 80 (London: Methuen & Co. 1950) (1776) ("No society can be flourishing . . . of which [any substantial number of members] are poor and miserable."); Gertrude Himmelfarb, The Idea of Poverty 46 (1983) (arguing that Smith makes improving the condition of society's poorest members a key criterion for judging economic systems); Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay, in Wealth and Virtue, the Shaping of Political Economy in the Scottish Enlightenment* 1-44 (Hont & Ignatieff eds. 1983) (meeting needs of poor as Smith's theoretical axis for assessing political-economic arrangements).

294. For a Madison or Jefferson, poor relief left paupers still "dependent" and, therefore, unqualified for citizenship. They favored ample material opportunities (they even occasionally championed rights to property in "full and absolute dominion") for all white men willing and able to exploit them, and charity or coercion for the rest. See Forbath, *supra* note 22, at 13-14 (discussing and quoting from the Madison and Jefferson texts relied on by Michelman and other constitutional welfare rights defenders like Sunstein).

CONCLUSION: BEYOND WELFARE RIGHTS

This may not be necessary in every liberal democratic society today to assure a person's standing as an "equal participant in public affairs." But to use a phrase with which Michelman recently has conjured, this account seems firmly embedded in America's "constitutional identity."²⁹⁵ The longstanding links between work, equal respect, and citizenship seem constitutive of "who we think we are and aim to be as a politically constituted people," of "where we think we have come from and where we think we are headed."

The idea that welfare rights fitted well with either a liberal or a republican understanding of the material bases of equal citizenship first was forged in the context of the welfare rights movement, as a scholar's contribution to that inspiring struggle. But the movement, like any social movement of subordinate people, was sharply constrained. It played the hand that history and the White House dealt it. Its programmatic vision, its strategy and goals, all were shaped by the social provision and institutional resources at hand—AFDC, Legal Services, and a sympathetic federal bench. But nothing about this conjuncture gave any assurance that welfare rights were the right solution to the problem of social and economic exclusion confronting poor black citizens. Black leaders like King and Rustin plainly thought otherwise; they called for a "Negroes' New Deal" that emphasized decent work. As a normative matter, I have suggested, they were right.

The welfare rights movement's vision of citizenship also was shaped by the fact that the movement's constituents were women and mothers. King and Rustin had nothing to say about this fact, and little enough to say about gender equality in general. But everything we know about women's experience with welfare and work suggests that welfare provision—while a moral imperative—cannot do the main tasks of securing gender equality for poor women. That also demands reforming the low wage labor market, assuring decent jobs for women, no less than men, and providing enabling rights, as well, to training and child care.

A liberal society that prizes the dignity of the individual, if it is an affluent one, which can afford a guaranteed income that protects all against desperate want, must do so. To refuse is, in Rawls' terms, to put an unbearable and unjust strain on individuals' commitments to the social compact. But that is not enough. Equal citizenship also requires social citizenship. The two are not in conflict; they work together. This is especially so if I am right that America may reform but will not abandon the less eligibility principle of classical liberalism. Suppose we were to embrace social citizenship and embrace as well a

295. See Frank I. Michelman, *Morality, Identity and "Constitutional Patriotism,"* 76 Denv. U. L. Rev. 1009 (1999).

generous, pluralistic conception of valued "work." Would we not reward those who performed such work more than those, not incapacitated, who did not? The guaranteed income the latter received would afford them freedom from desperate want—an income not far above the poverty level; it still would be a materially drab and circumscribed life, amid abundance. For the first time, however, such austerity would be defensible, because those who lived such lives also would be assured real opportunities for work and earning a more ample livelihood.

Of course, any such scheme is liable to err: in judging whether individuals can "measure up to generally reasonable minimum standards of active participation in the economy," or assessing "the extenuating force of [their] disabilities," or more generally, in assuring that the system of rewards and transfers leaves no one "desperately unprovisioned."²⁹⁶ We would significantly diminish the toll of those errors by providing a guaranteed income. But we would not rely on a guaranteed income for what it cannot do. We would not delude ourselves that a welfare guarantee could undo the stigma of permanent exclusion from a shared destiny of work and opportunity.

Once one embraces the view that a republican constitution must vouchsafe the social conditions of democratic lawmaking, one cannot leave the question of social citizenship where Michelman left it in these articles. One cannot leave the work- and economic-independence-and-participation-related aspects of social citizenship to the give and take of ordinary politics. Specification of what counts as decent work or recognized but non-waged contribution, and how, at a particular time, the nation ought to go about assuring such opportunities to all, of what counts as a decent livelihood at said time, of what counts as incapacity, and of what quantum of income should separate those, not incapacitated, who avail themselves of "welfare" or a guaranteed income versus those who "work"—all these issues and more may and, practically, *must* be addressed through political and market processes. But if social citizenship rights are prerequisites to political equality, then they must precede ordinary politics. In their general form as positive and enabling rights, they must become part of the constitutional framework, part of the law of lawmaking. Otherwise, a broad swathe of the citizenry will be denied—as today they are denied—a constitutionally fair opportunity to act as citizen-participants in the very debates and decision-making upon which their citizenly standing depends.²⁹⁷

How substantial the role of courts is in defining and enforcing these rights is a separate question. Historically, it always was envisioned as

296. See Michelman, *supra* note 11, at 15-16 n.21.

297. I am borrowing here the general form of an argument he makes against Charles Fried, in *Welfare Rights in a Constitutional Democracy*, 1979 Wash. L. Q. 659, 682-84.

a modest one. Were we to agree that social citizenship is a political right, we would only(!) be agreeing to this. When and where important rules and institutions of political and economic life are subject to scrutiny and affirmation, negation or revision, there the demands of social citizenship may be raised. The arena may be Congress, the federal agencies, or the broader, "informal public sphere" of "opinion and will formation,"²⁹⁸ as well as the courts. But there challenges may be raised against, and reasons must be given for existing arrangements, reasons which speak to the claims of social citizenship.

Would that it were not so. Would that we could broaden the material base of equal citizenship "merely" by instituting the simpler, arguably more liberal, and arguably more efficient means of a "basic" or "citizen's income," and leave the rest to ordinary politics. That proposal looms large in social citizenship debates abroad and has its important United States proponents.²⁹⁹ Many of its champions are prompted by the essential, but lately overdrawn, insight that government is significantly limited in its capacity to broaden the base of citizenship by broadening the base of work.³⁰⁰ They suggest that a generous basic income would enable people in the lower rungs of the labor market to resist demeaning and exploitative jobs; thus it would contribute indirectly to reforming that world of work. Often, these basic income proponents assail efforts to reconstruct the low wage labor market in the name of decent livelihoods—say, by instituting wage supplements. Such measures, they argue, carry forward the coercive implications of the nineteenth century workhouse, forcing poor citizens into menial wage labor, when there is no intrinsic moral value to such work.³⁰¹

True: demeaning, endless toil is not dignifying. It is not mandated but forbidden by the norms of social citizenship. Any work that does not earn one enough to avoid poverty for oneself and one's family is not adequate. But "menial work" can be meliorated; countless demeaning workplaces could benefit from a measure of democracy.

298. See generally Jurgen Habermas, *Between Facts and Norms* (1998).

299. Bruce Ackerman and Anne Alstott's thinking runs in this direction. See Bruce Ackerman & Anne Alstott, *The Stakeholder Society* 11 (1999). Ackerman and Alstott champion giving all citizens a sum of money to invest, rather than assuring them decent jobs. Alstott has provided a sustained basic-income based liberal critique of efforts to secure social citizenship through reforms of the low-wage labor markets, job creation and the like. See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 Yale L.J. 967, 971 (1999) ("The case for employment subsidies rests on mistaken or morally dubious claims about the intrinsic or instrumental value of paid work.").

300. See *id.*; see also Guy Standing, *The Need for a New Social Consensus, in Arguing for Basic Income* 47-60 (Phillipe Van Parijs ed. 1992).

301. See Alstott, *supra* note 299; Phillipe Van Parijs, *Basic Income Capitalism*, 102 Ethics 465 (1992); Phillipe Van Parijs, *Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income*, 20 Phil. & Pub. Affairs 101 (1991).

Many ill-paid jobs could be decently paid, without stopping up the springs of enterprise. Meeting unmet public needs could generate new jobs. The kinds of toil and contributions to society that count as compensable "work" could be enlarged. There are limits, but what can be done must be done. Everyday work sometimes feels like everyday dying. But for the nation's poor, exclusion from the everyday world of regular work and decent livelihoods is a kind of social death; it marks one as unworthy and saps self-respect and social recognition.

Some feminist theorists argue that a basic income, in virtue of being untethered to employment and the labor market, would enable poor women to fulfill women's traditional caring roles in ways that (somehow) did not reproduce an oppressive gender division of labor.³⁰² For my part, I concur with those who would afford a decent income to women or men who choose to depart from the labor market in order to devote a portion of their "work" lives to the care of young children or old parents. Such a measure would also relieve government of some of the burden of assuring decent wage work. As I've indicated, however, I am concerned that this kind of measure should not substitute for providing rights to decent employment and affordable childcare for those who would rather not devote themselves to such full-time family work. I also doubt whether a universal basic income would impart the same recognition to citizens who assume this socially valued responsibility.

Finally, some basic income proponents envision a new birth of "community work" and voluntary associations, springing from the emancipation of the poor from the labor market.³⁰³ This vision of once-marginalized people transformed into full-time citizens, thanks to an end to paid work, is an attractive utopia. But like many of the arguments advanced for a basic income, many of them close descendants of the arguments made on behalf of a Guaranteed Adequate Income in the 1960s, it rubs against the grain of our constitutional identity.

I may be wrong. Who we are and aim to be and where we think we are headed may be undergoing revaluations I understand too dimly. In any case, I do not urge a return to the social citizenship tradition in its salad days. The welfare rights movement, in its sharp departures from that older tradition, embodied an enduring critique of the latter's coercive, illiberal and gendered aspects, of its idealization of toil, and of its all-too-narrow conception of socially valued contributions to the common good. This critique has become part of the muted but ongoing conversation about social citizenship in America—about

302. See, e.g., Carole Pateman, *The Patriarchal Welfare State*, in *Democracy and the Welfare State* 231, 238 (Amy Gutmann ed. 1988).

303. See, e.g., Bill Jordan, *Basic Income and the Common Good*, in *Arguing for Basic Income* 155-77 (Phillippe Van Parijs ed. 1992).

citizenship, personhood, and equal standing, and their relationship to work and a social minimum. There are constitutional stakes in that conversation, and constitutional thinkers and advocates must return to it.³⁰⁴

304. While Michelman has not returned to the question of equal citizenship's material bases since the 1980s, he plainly does not disagree. No one is harder at work today on behalf of the proposition that "'liberal democratic constitutionalism' must be a name for a social form of life as well as for a set of procedures for political decisionmaking." The constitutionalism Michelman has begun to expound is one whose Bill of Rights is also "a bill of entitlements" and one that apparently reaches the "laws [that shape our] . . . work and workplaces" as well as "schools, housing, property, speech, the media, and so on." Frank I. Michelman, *Progressive-Liberal Democratic Constitutionalism*, 4 Widener L. Symp. J. 181, 194-95 (1999).

Notes & Observations